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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1944

No. 160

ELGIN-JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,
Petitioner,

v.

G. W. BURLEY, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE ON REARGUMENT.

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BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE ON REARGUMENT.

OPINIONS BELOW

The opinion of the court below (R 110-113) is reported in 140 F. 2d 488. The district court's opinion is not officially reported but appears at R. 80-84; its summary judgment may be found at R. 99-100.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 2, Paragraph Fourth of the Railway Labor Act, confers the power on the union chosen by a majority of the employees in a craft or class, to contract on behalf of each employee in the craft or class in the adjustment of grievances and to act on behalf of each employee in submitting to the National Railroad Adjustment Board such grievances as are not adjusted in conference on the property.

STATUTE INVOLVED

The statute involved is the Railway Labor Act, as amended in 1934, 48 Stat. 1185, 45 U.S.C., Section 151, *et seq.*

STATEMENT

On November 19, 1940, Burley and 23 other employees of petitioner † brought a suit in the district court of the United States for the Northern district of Illinois, Eastern division, in which they alleged that petitioner had failed to observe the starting time provisions of a collective labor agreement between petitioner and the Brotherhood of Railroad Trainmen and by reason of such failure "in accordance with the established practice among railroads and employees thereof" these employees became entitled to pay "for an additional day at time and one-half, at the regular daily rate from August 26, 1934 to and including November 14, 1938" for each day they had been required to work (R. 3-6).* Petitioner filed a motion to dismiss in which it alleged that on October 31, 1938, the Brotherhood of Railroad Trainmen entered into a written compromise agreement with petitioner relating in part to the dispute respecting starting time set forth in the complaint and that on September 6, 1940 the National Railroad Adjustment Board by order of the First Division had held this compromise agreement a bar to any recovery on the claim (R. 9-10). The motion to dismiss was supported by an affidavit to which copies of the proceedings before the National Railroad Adjust-

† The record does not disclose whether there were any other employees in the craft or class at the times here mentioned.

* The "practice" here involved has been described as follows: "To the newcomer to the field one of the most interesting types of cases concerns the application of the so-called 'arbitraries' and special allowances and penalties. Extreme examples of these are the 'starting-time' rule and the 'yard-road' rules. If the rule prescribes that starting time shall be 8 o'clock, and the crew is supposed to work eight hours, the crew may get paid for 20 hours if it starts to work at 7:30 and works 8 hours. The theory of this is that the period from 7:30 to 8:00 is a part of a different working day; an 8-hour day is guaranteed and, therefore, for the different working day 8 hours' pay is due; but since all of the work is within a 24-hour period, one 8-hour period calls for pay at the rate of time and a half, or 12 hours, and those 12 hours added to the other 8 hours make a total of 20 hours." Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Railway Labor, Senate Doc. 10, Pt. 4, 77th Cong., 1st Sess., p. 3.

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ment Board were attached as exhibits (R. 11-39). The complaining employees filed a motion to strike the motion to dismiss on the ground that it set up new and additional evidentiary matter not proper in such a motion (R. 41). Thereafter petitioner filed a motion for summary judgment (R. 42). The complaining employees opposed this motion alleging that the Brotherhood was not authorized by its constitution and by-laws and they had never specifically authorized it to enter into any agreement compromising claims of the complaining employees for damages for violation of Article 6 nor to prosecute claims before the Adjustment Board for such damages but that the Brotherhood's authority was limited "to prosecuting a complaint before the Board to compel the defendant to comply with Article 6" (R. 43-45). This opposition was supported by affidavits to which were attached the constitution and by-laws of the Brotherhood (R. 45-61).

The district court on February 10, 1941, rendered an oral opinion (R. 80-84) and on February 20, 1941 by summary judgment dismissed the suit (R. 84-85). Upon appeal this decision was reversed by the Circuit Court of Appeals for the Seventh Circuit upon jurisdictional grounds pertaining to diversity of citizenship, *Alderman* v. *Elgin, Juliet & Eastern Ry. Co.*, 125 F. 2d 971 (C.C.A. 7). Thereafter the complaining employees amended their complaint to eliminate thirteen of the twenty-four plaintiffs and thereby cure the defects as to jurisdiction (R. 96-100). The district court again rendered a summary judgment for petitioner upon the theory that the award of the National Railroad Adjustment Board was conclusive (R. 84-85). Upon appeal the Circuit Court of Appeals for the Seventh Circuit reversed, holding that a summary judgment should not have issued since the pleadings raised an issue of fact as to whether the Brotherhood had ever been authorized by the complaining employees to "negotiate, compromise, and settle their claim for damages for past violations of Article 6" (R. 112-113).

The material facts set forth in the pleadings and annexed exhibits are as follows:

Prior to July 27, 1934, the intra-plant switching at the Standard Oil Company refineries at Whiting, Indiana, was per-

formed by train crews employed by that Company. Beginning on July 27, 1934, and subsequently to date, this intra-plant switching has been performed by petitioner (R. 27). Yard crews employed by the Standard Oil Company prior to July 27, 1934, were ordered to commence work each day at hours fixed in advance by plant management. These hours varied from time to time, according to the demands of manufacturing operations (R. 32-33).

On July 24, 1934, petitioner and the Brotherhood of Railroad Trainmen agreed that their contract of April 1, 1927 should be deemed applicable to the intra-plant switching crews from and after July 27, 1934, but that for a period of time Article 6 thereof, which prescribed a fixed starting time for yard crews, should not be applicable (R. 4, 35-36). The complaining employees contend that there was a verbal waiver of Article 6 for a 30-day period only (R. 4, 27), but that, if it was for a longer period, the verbal waiver was ineffective to alter the terms of a written contract (R. 27-28, 35-36). Article 6 of the contract of April 1, 1927, provides (R. 4):

> (a) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours advance notice. Present practice as to the handling of transfer crews is not affected by the foregoing.
>
> No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.
>
> (b) Yard crews shall have a designated point for going on duty, and a designated point for going off duty.
>
> Starting time of yard crews on one, two or three 8-hour shifts will be as follows:
>
> 7 a. m., 8 a. m. and 8:30 a. m.
>
> 3 p. m. and 4 p. m.
>
> 11 p. m, 12 midnight, and 12:30 a. m.

* * *

Article 25 of the contract provides (R. 5):

> Any controversy arising as to the application of the rules herein agreed upon to the Schedule shall be taken up by the local committee and the local officials. In the event of failure on their part to agree upon a satisfactory basis of settlement, the General Committee may take up the question with the General Superintendent, and in the

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event of their failure to agree upon a satisfactory settlement, the committee may appeal to the Vice President.*

The complaining employees were all members of the Brotherhood of Railroad Trainmen on July 27, 1934 and continued to be members through November 15, 1938 (R. 3, 9). Continuously during this period petitioner required them to start work at times other than those fixed in Article 6 of the agreement (R. 5, 27, 31-32). They, "at various and sundry times since August 26, 1934," made demand upon petitioner to observe the terms of Article 6 and they conferred and lodged protests with various officials of petitioner including the local officials, General Superintendent and the Vice President, as required by Article 25 (R. 5).

On November 23, 1936, the Brotherhood of Railroad Trainmen filed a claim against petitioner with the First Division of the National Railroad Adjustment Board for failure to put into effect the starting time as provided in Article 6 (R. 11, 13-14). The statement of claim alleged that petitioner justified its refusal to observe these starting times because petitioner had made "arrangements with the Engineer's Committees that they would be privileged to start the crews at the time that such crews were started while the switching was being done by the Standard Oil Company crews" (R. 13). This claim was assigned Docket No. 3537 by the Adjustment Board (R. 11-12, 14-15).

On October 28, 1938, the President of the petitioner settled 24 cases or grievances between the petitioner and the Brotherhood of Railroad Trainmen, including Adjustment Board Docket No. 3537 (R. 9-10, 12, 16-23, 33-34, 39). The settlement was embodied in a letter, which so far as here material stated (R. 17, 23):

---

* This provision in the contract would bind all employees in the unit to a procedure by which their grievances would be settled only by agreement between the carrier and the Brotherhood. The government in its brief completely ignores this contract, although in 40 Op. Atty. Gen. 59 it took the view that such a contract was valid. Moreover, the Government's brief, pp. 8, 45-49, cites letters from members of the National Mediation Board which the government in its brief in *General Committee* v. *Missouri-Kansas-Texas Railroad*, Nos. 23, 27, 41, October Term, 1943, p. 73, note 59, states, no longer represent the views of the Mediation Board on this question. See also brief in the *M-K-T* case, p. 80, notes 67 and 68.

Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times for a ninety-day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

* * *

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,
S. M. Rogers, President

Accepted for the Yardmen Oct. 31, 1938
C. H. Williams, General Chairman, B. of R. T.
S. F. Johnson, Secretary, B. of R. T.

The Brotherhood of Railroad Trainmen thereupon withdrew Docket No. 3537 from the Adjustment Board (R. 24-25).

On April 18, 1939, the Brotherhood filed another claim with the Adjustment Board, Docket No. 7324 asking "for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in

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the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement * * * effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive" (R. 69, 79). The petitioner set up the settlement agreement of October 31, 1938 as a bar (R. 53-60). The Brotherhood took the position that the case it settled "held no claims for payment for time. It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting Yard to work at times other than the fixed starting time provided for in Article 6" (R. 29).

The National Railroad Adjustment Board by Award No. 5048, issued September 6, 1940, denied the claim in Docket No. 7324, because "the evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938" (R. 39).

SUMMARY OF ARGUMENT

I

Collective bargaining, like individual bargaining, is a system for governing industrial relations. The relative economic weakness of employees under individual bargaining results in the vesting of autocratic power over all phases of the employment relationship in the employer. Collective bargaining seeks to democratize the process of governing employment relationships by according to the employees equal voice with the employer in the affairs which concern them both. This democratization is accomplished by substituting, at all times, on the employee side of the conference table, a representative of all the employees for each of the employees alone. Collective bargaining and individual bargaining are antithetical systems; since both operate on the same subject matter it is apparent that the two systems cannot coexist in the same enterprise. The autocratic power exercised by employers under individual bargaining is as evident in the executive and judicial phases of industrial government, i.e., in the enforcement and interpretation of agreements, as in the legislative,

or contract making, phase. Therefore, where collective bargaining replaces individual bargaining as the system for governing industrial relations, an exclusive bargaining representative is substituted for the employees as individuals in the executive and judicial as well as the legislative phases of that government.

Such substitution, in the legislative phase, results in the introduction of mutuality of rights and obligations between employees and employers, as well as in substantive rules more favorable to the employees' interests. In the executive and judicial phase, the substitution results in safeguarding of employee gains; in according them protection against diminution of the employer's obligation through unfair interpretation of agreements and in securing for them adequate redress in cases of violation of the agreement.

Collective bargaining in theory and practice, recognizes a distinction between legislative and justiciable issues. Legislative issues require a determination of what the rules should be. They are issues which, for lack of a mutually accepted standard, must be resolved by trading or compromise. Justiciable issues are those involving the interpretation or enforcement of obligations in accordance with principles already subscribed to by the parties in an agreement. They are commonly dealt with under grievance procedures created by contract between the employer and the exclusive representative. Although such issues are not properly to be decided on the basis of compromise, but rather on the basis of principle, the participation of the exclusive representative in their resolution is indispensable to adequate protection of the interests of the employees as a whole. Since the settlement of a matter involving interpretation or application of an agreement will normally have both prospective and retrospective aspects, and since both aspects invariably affect the collective interest of the entire group of employees, collective bargaining has never distinguished between grievances on the basis of their prospective or retrospective character. By virtue of its rejection of all aspects of individual bargaining, collective bargaining requires the participation of the exclusive representative in place of individual employees in all matters which may be disposed of by agreement between employer and employee.

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The philosophy and practice of the trade union movement, based in large part as it is upon political analogy, adopted the democratic principle of majority rule as the guide for determining when collective bargaining should replace individual bargaining, as well as for determining the identity and policies of the exclusive representative. It relied further on familiar democratic concepts to mark the outposts of legitimate exercise of governmental power by the representative and the rights of individuals and minorities. Among those rights is one, analogous to that guaranteed by the Federal Constitution, which permits individuals and minority groups to voice their views and present their claims to the employer as well as to the exclusive representative, between whom the governmental power is divided.

II

The common law concepts of agency, third party beneficiary, and freedom of contract which were commonly applied by the courts to agreements arising out of industrial relations are incompatible with the hypotheses upon which the system of collective bargaining rests. Collective bargaining could not flourish in a legal climate which presumed that equality of bargaining power existed between employers and individual employees, which treated the bargaining representative as a mere agent to be discarded at the will of each individual employee, and which discerned as the party to contracts executed by such representative, not the representative, but the individual employees. The premise that freedom of contract for employees existed only if the workers acted as one man required that the representative be accorded a status similar to the status of a political representative; that it alone be empowered to contract on behalf of the employees; and that it alone, representing the collective employee interests, be deemed the party to collective agreements. Once these requisites were met further implementation would be required to determine when collective bargaining should be instituted and to set forth the duties of the representative to its constituents.

III

In the Railway Labor Act, as in the National Labor Relations Act, Congress enacted a system of governing employment relationships based on the principles and practices of collective bargaining. In both Acts Congress required employers to recognize that the representatives selected by a majority of the employees have the sole right to contract on behalf of the employees with respect to all matters requiring agreement between employers and employees. While Congress distinguished in the Railway Labor Act between disputes resolvable only by new agreement between employers and unions and disputes resolvable by interpretation or application of existing agreements, the distinction was drawn solely for the purpose of defining the procedures and jurisdiction of the ultimate tribunals available for disposition of the respective types of disputes, and not for the purpose of distinguishing between the powers accorded the exclusive representative with reference to the two types of disputes.

The provisions of the Act make it clear that the statutory representative has exclusive authority to settle with the employer all disputes; those arising over matters of interpretation and application of agreements, as well as those arising over new agreements. The legislative history of the Act shows that Congress rejected suggestions which would have confined the powers of the statutory representatives to contracting with employers respecting legislative matters.

The corresponding provisions of the National Labor Relations Act and their legislative history likewise show that Congress, in creating legal systems appropriate to the development of collective bargaining and adopting majority rule, accepted the view of students of labor relations that exclusive authority to contract on behalf of employees with reference to judicial and executive, as well as legislative matters, must be vested in a single bargaining representative.

The right to present grievances reserved to individuals and minorities under the National Labor Relations Act comprehends no more than the right to voice their views and present their case; it does not comprehend the right to bargain and contract with the employer for the settlement of grievances.

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Sponsors of the proviso to Section 9 (a) which confers this right recognized its counterpart in the Constitutional guarantee of the right to petition the Government for redress of grievances, and made it clear that they did not intend the grant of such a right to be misconstrued to permit individual bargaining with regard to grievances. Indeed, the legislative history of the Act establishes Congressional acceptance of the view that once a collective bargaining representative had been selected by the majority no individual bargaining of any kind is permissible.

Adoption of the principle of majority rule itself stemmed from adherence to the view prevalent in the labor movement that the fixing of terms and conditions of employment was industrial government. In adopting that rule Congress recognized that only unitary dealing with employers through exclusive representatives would comport with the objectives of collective bargaining, and explicitly rejected suggestions which would have diminished the exclusive power of the representative chosen by the majority. In defining the rights of individuals and minorities under majority rule Congress again placed reliance upon precedents drawn from political life. In addition to the advantages derived by individuals from collective action, which would more than compensate for the loss of any theoretical rights they possessed under individual bargaining, Congress accorded them the traditional democratic guarantees of freedom from arbitrary and discriminatory action by the representative, the right to participate in selection of the representative, and the added protection of the right to present grievances.

The protections accorded individuals and minorities under the Railway Labor Act are identical with those accorded them under the National Labor Relations Act. The proviso to Section 2 Fourth of the Railway Labor Act, while it can be construed to permit individuals and minority groups to present their views to the employer on any and all subjects of collective bargaining, including grievances, cannot be construed to permit individual employees to settle grievances by contract with the employer.

The provisions of the Act relating to the disposition of

grievances support this interpretation. Throughout the Act Congress recognized the collective agreement as a bi-party contract between the employer and the exclusive represntative. In creating the National Railroad Adjustment Board to serve as the final repository of judicial power in grievance cases, Congress emphasized its view that governmental power in the industry was divided only between employers on the one hand and unions on the other. It provided that membership on the Board should be equally divided between employers and unions. By permitting employers and unions to supplant the Adjustment Board with grievance tribunals of their own, Congress made it clear that the provisions establishing the Board created no rights which could not be eliminated by agreement between the employer and the statutory representative.

Just as Congress vested in the employer and the exclusive representative alone power to settle grievances in the final stage, so did it vest in them alone the power to settle grievances at earlier stages. This conclusion is supported by the historical practice of collective bargaining on the railroad, the continuation of which was dictated in the Act, as well as by the absence of provision for participation by individuals and minorities in the deliberations and decisions of the employer and the statutory representative. Moreover, the statute confers no right upon individuals to present cases to the Adjustment Board. Clearly, therefore, the right preserved to individuals under the Railway Act with respect to grievances must be only the right to present cases to the employer and not the right to contract with the employer for their disposition.

IV

Decisions of the National Labor Relations Board and of the courts support this view of the power of the exclusive representative under both the Railway Labor Act and the National Labor Relations Act, and the analysis of the rights accorded individuals and minority groups in those Acts. The Board has consistently held that to accord individuals the right to contract with employers concerning the settlement of grievances is incompatible with the statutory scheme for col-

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lective bargaining. And this Court, recognizing that the statutes adopted the philosophy of collective bargaining, has held that on every subject, no matter how exceptional, individual bargaining whether it results in terms better or worse than those which might be obtained by the exclusive representative, was outlawed. The Court has further held that under majority rule in collective bargaining individuals possess the same rights against the repositories of governmental power in industry as they possess in political democracy.

ARGUMENT *

I. THE THEORY AND PRACTICE OF COLLECTIVE BARGAINING AS DEVELOPED IN THE TRADE UNION MOVEMENT EXCLUDES ALL INDIVIDUAL BARGAINING CONCERNING GRIEVANCES.

Collective bargaining is a system for governing employment relations.[1] The system is predicated upon twin hypotheses: first, that effective participation by employees in the resolution of issues affecting their jobs is not only desirable in a democratic society but is indispensable to prevent exploitation of workers by employers; second, that since individual employees, lacking financial strength,[2] experience in negotiations,[3] and

* We respectfully refer this Court to the Memorandum in Support of Petition for Rehearing previously filed in this case by the Congress of Industrial Organizations for a discussion of certain points not dealt with in this brief. (See particularly pp. 9-12, 13-14, 19-21.) Because we wished to discuss the economic, legislative, judicial, and administrative authority on the subject of grievances with some thoroughness, we have refrained from discussing these additional points herein.

[1] Perlman, Selig, and Taft, Philip, *History of Labor in the United States*, 1896–1932 (New York, 1935), p. 10, "The trade agreement . . . is a written constitution by a new type of government, an *industrial government*, established by bargaining as an organized group. . . . the industrial government envisaged by unionism was a highly integrated government of unionized workers and of associated employer-managers, jointly conducting the government with 'laws' mandatory upon the individual employer and employee"; Hoxie, Robert Franklin, *Trade Unionism in the United States* (New York, 1920), p. 255; Catlin, Warren B., *The Labor Problem* (rev. ed., 1935), p. 424.

[2] McCabe, David A. and Lester, Richard A., *Labor and Social Organization* (Boston, 1938), p. 87; Taussig, F. W., *Principles of Economics* (New York, 1936), p. 300; Tead, Ordway, *Instincts and Industry* (New York, 1918), pp. 118–126; Daugherty, Carroll, R., *Labor Problems in American Industry* (New York, 1936), p. 414.

[3] Webb, Sidney and Beatrice, *Industrial Democracy* (London, 1897), p. 181, 843–847; King, William Mackenzie, *Industry and Humanity* (New York, 1918), pp. 235-238; Daugherty, op. cit. *supra*, note 2, p. 413.

knowledge of the economic and technical aspects of industry,[4] are in fact wholly unable to deal on a basis of equality with employers, effective employee participation is possible only through substitution of a single group voice for the voices of the individual employees.[5] These hypotheses require substitution, on the employee side of the conference table, of a representative of all the employees for each of the employees alone.[6] This substitution is accomplished by vesting in the representative all power to settle with the employer questions affecting terms and conditions of employment,[7] which, under the system of individual bargaining the employees possess in theory, but are helpless to exercise. Collective bargaining, therefore, rejects completely individual bargaining and unilateral employer action. The subject upon which the antithetical systems of collective bargaining and individual bargaining operate, i.e., the creation, interpretation and enforcement of rights and duties of employers and employees, vis-a-vis each other, are identical; it is apparent that "the two cannot exist side by side."[8]

The weakness of the employee under the system of individual bargaining tends to obscure the extent to which that system, like collective bargaining, operates as a mechanism for the

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[4] Webb, op. cit. *supra*, note 2, p. 181, McCabe, op. cit. *supra*, note 2, pp. 86-87; Daugherty, op. cit. *supra*, note 2, p. 413.

[5] Webb, op. cit. *supra*, note 2, pp. 173-179, 842; Mitchell, John, *Organized Labor* (Phila., 1903), pp. 3–4; Carver, Thomas W., *Principles of Political Economy* (Boston, 1918), p. 403; Hoxie, Robert Franklin, *Trade Unionism in the United States* (New York, 1923), pp. 255–257, 287; Watkins, Gordon S., *An Introduction to the Study of Labor Problems* (New York, 1922), pp. 332–333; Catlin, Warren B., *The Labor Problem* (New York, 1926), p. 322; Cummins, E. E., *The Labor Problem in the United States* (New York, 1932), pp. 261–262; Daugherty, Carroll R., *Labor Problems in American Industry* (New York, 1933), p. 415; Taft, Philip, *Economics and Problems of Labor* (Harrisburg, Pa., 1942), p. 703; Leiserson, William M., *Collective Bargaining and Its Effect on Production*, Annals of the American Academy of Political and Social Sciences, Vol. 91, Sept. 1920, pp. 42–43.

[6] Yoder, Dale, *Labor Economics and Labor Problems* (New York, 1933), p. 438-443; Taylor, Albion G., *Labor Problems and Labor Law* (New York, 1938), pp. 86–87; Gompers, Samuel, *Collective Bargaining* (Washington, D. C., 1920), p. 1 (Pamphlet published by the American Federation of Labor, on file in the United States Department of Labor Library); Hoxie, op. cit. *supra*, note 1, p. 294.

[7] See authorities cited notes 5 and 6, *supra*.

[8] Golden, Clinton S. and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (New York, 1942), p. 26.

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government of industrial relations. The discrepancy in bargaining power between employer and employee leaves with the employer autocratic power not alone to create the rules which are to be binding upon the employees and upon himself, but also to change, to interpret, and to enforce those rules at will. Seldom, under individual bargaining, is the employer constrained to bind himself by contract for any definite period to assume duties or obligations to the employees. Typically, government of industrial relations consists, almost solely, of rules laid down by employers fixing the duties and obligations of employees, which, as this Court pointed out in 1898, the employees "are practically constrained to obey." *Holden* v. *Hardy*, 196 U. S. 366, 397.[9] The employer exercises the legislative power to make the rules, the judicial power to interpret them and the executive power to enforce them. The concentration of power, the lack of mutuality of obligation, and the absence of participation, all so foreign to democratic concepts, tends to induce reluctance on the part of those steeped in the democratic tradition to recognize the governmental character of the system of individual bargaining.[10]

The political analogy becomes somewhat more distinct where

[9] Bishop Francis Haas, a member of the National Labor Board established under Section 7 of the N.L.R.A., testified: "customarily, the wage relationship prior to June 16, 1933, was referred to as an individual bargain. In point of fact, among the overwhelming number of 48,000,000 workers in the United States there was no bargaining whatsoever. True, for approximately 10 percent there was union collective bargaining. . . . The great mass of workers were, at the time they were hired, simply told what they would get. Very frequently, they were not even told. After employment, when piece rates were changed, the foreman simply announced the new rates. He could announce rates as low as he chose, limited only by the shortage of workers standing ready to take jobs. Briefly the typical employer-employee relationship did not have even the appearance of trading or bargaining. The employer simply notified the worker what wages he was to get and the hours he was to work." Hearings before the Committee on Education and Labor, U. S. Senate, 73rd Cong., 2nd Sess., on S. 2926, Pt. 1, p. 116. See also Pt. 3, pp. 938–939. ". . . The expression 'individual bargaining' does not imply a bargaining process so much as it implies that the choice on the part of the worker between 'taking it or leaving it' is made individually, that is, without and concerted action with other workers in the matter." McCabe, op. cit. *supra*, note 2, p. 84.

[10] Webb, op. cit. *supra*, note 2, pp. 840-842, 217-218; Cf. American Federation of Labor Reconstruction Program, reprinted in Commons, John R., *Trade Unionism and Labor Problems* (Boston, 1921), pp. 562–563; Woll, Matthew, *Labor Industry and Government* (New York, 1935), p. 112.

individual contracts are entered into which set forth the basic law of the industry. Here too, of course, the employee is helpless to participate effectively in the formation or interpretation of the rules embodied in the contract. But mutuality of obligation is superficially present. In large industrial enterprises, where individual employment contracts are utilized, the employer undertakes to live up to the terms of the contract for its duration. The contracts are offered on a "take it or leave it" basis, however, and are accepted by the employees out of economic necessity. When some question arises which is not covered by the contract and which requires a new rule, such as, for example, whether time and a half or double time should be paid for holiday work, the employee can request double time, but the decision is made by the employer. The employer's control over the executive and judicial phases of the process are equally demonstrable. Assume that during the life of the contract the employer decides to lower the wage rate. The employee is as powerless to enforce compliance with the terms of an individual contract or to prevent the substitution of a new, and less favorable contract, as he was to reject the original contract offered by the employer. Or assume that an employer refuses to grant a promotion to which an employee believes himself entitled, on the ground that, as the employer construes the contract, the promotion is not due. If the issue is at all complicated the individual employee is wholly incapable of pressing his interpretation of the contract in the face of a contrary interpretation relied upon by the employer and his staff of experts. Assume further that an employer offers to settle an employee claim for overtime due under the contract for a fraction of the amount actually due. Again, the employee is forced by his economic weakness to accept the employer's offer, regardless of the merits of the claim.

Theoretically, of course, in each of these instances, the employee could resort to the courts for enforcement of his rights under an individual contract. As a practical matter, however, the picture of an ordinary employee in a large industrial enterprise suing his employer to recover benefits due him under his contract of employment, is unrealistic. Often the sums in issue are so small as to render the cost of litigation prohibitive.

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More important, the employee simply cannot afford to take action which would alienate the employer upon whom he is dependent for his job. Even where the employee has a contract which protects him against discharge until its expiration, the employer is still able to inform him that he will be discharged at the end of the contract term if he brings suit. In fact, many employers have a rule making the commencement of legal proceedings ground for immediate dismissal.[11] In practice then, under individual bargaining, claims by employees, whether based on a contract, or not, are settled in the same way, and on the employer's terms.

When collective bargaining supersedes individual bargaining as the system of government in industrial relations, control of the entire governmental process shifts from the employer alone to the employer and the exclusive bargaining representative of all the employees in the unit, acting jointly by agreement. Experts in labor relations uniformly assert that collective bargaining substitutes the exclusive bargaining representative for the individual in the legislative, executive, and judicial phases of industrial government, i.e., "in negotiating, interpreting and enforcing contracts and agreements."[12]

The effect of the substitution of a collective representative for individual employees in the legislative process in twofold.

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[11] For example, in *N.L.R.B.* v. *Bank of America*, 147 F. (2d) 287 (C.C.A. 9), the employer had such a rule.

[12] Watkins, Gordon S., *An Introduction to the Study of Labor Problems* (New York, 1922), pp. 332-333; see also Webb, op. cit. *supra*, note 2, pp. 179, 182-183, 194-195, 198-199, 203-204, 234-237; Hoxie, op. cit. *supra*, note 1, pp. 256, 264-267, 270-272; Lee, John, *Dictionary of Industrial Administration* (London, 1928), p. 88; Twentieth Century Fund, *Labor and Government* (New York, 1935), pp. 46-47; Taylor, op. cit. *supra*, note 6, p. 87; Daugherty, op. cit., *supra*, note 5 (1938, ed.), pp. 450, 452-453, Brooks, Robert R. R., *As Steel Goes* (New Haven, 1940), pp. 204, 211; Cooke, Morris L. and Murray, Philip, *Organized Labor and Production* (New York, 1940), pp. 192-193; Lester, Richard A., *Economics of Labor* (New York, 1941), pp. 626-627; Taylor, George W., The Function of Collective Bargaining, in American Management Association, Personnel Series No. 81, Management's Stake in Collective Bargaining (1944), pp. 11-13; Dash, Allen G., *Bargaining Through the Grievance Procedure*, in American Management Association, Personnel Series No. 82, The Collective Bargaining Agreement in Action (1944), pp. 3-5; Shulman, Harry, The Role of the Impartial Umpire, ibid., pp. 7-8; Peterson, Florence, *American Labor Unions* (New York, 1945), pp. 231-237; Weyand, Ruth, *Majority Rule in Collective Bargaining* (July 1945), 45 Col. L. Rev. 556, 588-589.

First, the bargaining power of the group is utilized to secure rules more favorable to the employees as a whole than they could secure through individual bargaining; second, the bargaining power of the group is utilized to obtain from the employer binding commitments, thereby introducing mutuality of rights and mutuality of obligations into the employment relations. The collective agreement arrived at through negotiation between the employer and the exclusive representative becomes the basic law of the industry.[13] In it are included the rules agreed upon by the parties respecting such problems as they can foresee and deem of sufficient importance to handle in this fashion. In many instances the exclusive representative will seek to include in the contract provisions settling all "grievances" [14] which exist at the time the exclusive representative is recognized. These may include, for example, demands for higher wage rates, shorter hours, paid vacations, seniority systems and, perhaps, a bonus based on work previously performed. Such demands raise issues of policy as to

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[13] *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 638 (C.C.A. 4); Twentieth Century Fund, *Labor and the Government* (New York, 1935), p. 47; Hoxie, op. cit. *supra*, note 1, pp. 264-265; Perlman, Selig, and Taft, Philip, *History of Labor in the United States*, 1896-1932 (New York, 1935), p. 10; Brooks, Robert R. R., *As Steel Goes* (New Haven, 1940), p. 204; Golden and Ruttenberg, op. cit., *supra*, note 8, p. 43.

[14] The term "grievances" is often used to signify all matters arising out of employment relations which may be disposed of by agreement between employees and employers, the definition originally given the term in collective bargaining parlance. Subsequently the term has been accorded a variety of meanings. It is sometimes utilized to refer to matters handled pursuant to grievance procedure; in such instances a distinction is usually drawn between grievances and issues which require new agreement between the parties. We believe that the term is so used in the Railway Labor Act. See *infra*, p. 35. The term, however, has occasionally been used also to refer to matters of primary interest to individual employees which involve some personal complaint not related to wages, hours, or other basic conditions of employment and not covered in the collective bargaining agreement. Conceivably, the term "grievances" as used in the Railway Labor Act could have the latter meaning, as being a kind of dispute distinguished from disputes arising out of "interpretation of application of agreements" on the one hand, and disputes concerning "rates of pay, rules, or working conditions" on the other. If this be its definition, however, since the matter here in issue is wages and hours fixed in a collective agreement, it would not be a grievance within the meaning of the Act. In the National Labor Relations Act, the term "grievances" appears in contexts which indicate that Congress there utilized the term in its broadest meaning *(infra*, pp. 37-38).

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which, in the absence of a collective agreement, there is usually no standard by which the correctness of any particular solution can be judged.[15] The process of arriving at agreement is necessarily, therefore, one of trading or compromise.

Wide variety exists in practice, with respect to the number and type of matters dealt with in collective agreements. In some industries the parties seek to incorporate in the collective agreement detailed formulae for resolving forseeable future questions as well as detailed solutions of all questions which antedate the agreement, thus narrowing the range of legislative problems to be faced in the future.[16] In other industries the collective agreement is merely a skeleton, containing broad principles, which are to be implemented by a process of day to day negotiations, as specific issues arise.[17] It is universally

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[15] Webb, op. cit. *supra*, note 2, pp. 184, 225-233; Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 48-49.

[16] Pierson, Frank C., *Collective Bargaining Systems* (Washington 1942), pp. 26-30. Although agreements in bituminous coal fall in this category their grievance machinery has been said to establish "an orderly process by which the rights of both parties could be protected, disputed terms could be interpreted with a minimum of friction and 'continuous bargaining' could 'take place on subjects not specifically covered by the agreement' ". Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), p. 244. Cf. Report of the United States Coal Commission, Sen. Dec. 195, 68th Cong., 2nd Sess. (1925), Pt. III, p. 1345. The agreements entered into by the International Ladies' Garment Workers, have been described as "far more detailed and comprehensive than those of other unions," Christenson, C. Lawrence, *Collective Bargaining in Chicago*, 1929-1930, Univ. of Chi. Press (1933), p. 326. Yet in a description of the functions of this union, another author states: "In addition to price settlements the union is called upon by its members to adjust various other complaints and grievances in the shops. A great number of such disputes—concerning unequal distribution of work, discharges, back pay, or wage rates below the minimum scale—are inevitable under the best phrased contracts and the most cooperative employers. Their settlement constitutes in bulk and in importance the characteristic activity of the union as a business organization." Carsel, Wilfred, *A History of the Chicago Ladies' Garment Workers Union*, Normandie House (1940), pp. 247-248.

[17] In such industries, the agreements "set forth the general framework" of the relationship between the employer and the union and "leave the details to be filled in by daily negotiations." Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), p. 644. At p. 566, the authors state: "To the large steel companies . . . collective bargaining revolves mainly about the settlement of grievances." See also Taylor, George W., op. cit. *supra*, note 12, pp. 11-13; Dash, op. cit. *supra*, note 12, pp. 3-5.

recognized, however, that it is impossible to foresee in advance all questions which may arise in the course of industrial development with respect to which the parties must eventually come to agreement. Changes in market conditions, new inventions, cost of living changes, all indicate the necessity of providing for additions to and changes in the basic contract. The process of legislating in the field of collective bargaining is, and must be, a continuous one.

The judicial phase of industrial government likewise differs markedly under collective bargaining from the situation under individual bargaining. Application of the terms of an agreement, no matter how detailed, is bound, of course, to give rise to questions of interpretation. And, just as the employees participate through their representative in the formulation of the contract so do they participate through their representative in the interpretation and enforcement of the contract.[18]

The Brief of the United States as Amicus Curiae, pp. 4, 10, 20-21, 32, 33, recognizes that the disparity of bargaining power between employers and individual employees is equally present and equally significant in negotiations for adjustment of executive and judicial as well as legislative matters. Participation of the exclusive representative in the judicial phase of collective bargaining is essential not only to protect the interests of the individual employee who may present a claim, but also, to safeguard the interest of the group as a whole. It is a fundamental principle of trade unionism that "the only way to prevent [progressive deterioration of wages and other working conditions] is to rule out all competition between the individual workers of the group, both in the making of the bargain with the employer, and in the subsequent interpretation of it and work under it" [19] Were employees permitted to bargain with the employer concerning the settlement of alleged violations of the contract, each victim of such a violation would be likely to receive far less than that to which he was entitled. Indeed, the employer might find the cost of settlement with individuals so small as to warrant his wholesale

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[18] See authorities cited in note 12, *supra*.

[19] Hoxie, Robert Franklin, *Trade Unionism in the United States* (New York, 1923), p. 255. See also, Watkins, op. cit. *supra*, note 12, pp. 332-333; Taylor, op. cit. *supra*, note 6, pp. 86-87.

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departure from the standards laid down in the contract. In this manner "what was made collectively could be promptly unmade individually." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 343, 346. Where interpretation of a term of the agreement is involved the employer may find individual employees willing to accept, or unable to resist, interpretations which detract from the full force of the obligation imposed upon the employer in the collective agreement. Because of the precedent creating nature of such interpretations,[20] it is apparent that the interpretation acceptable to the most necessitous among the employees would soon become the interpretation binding upon all. For these reasons collective bargaining rejects these manifestations of individual bargaining as it does all others. The Brief of the United States, p. 4, admits that when a collective bargaining representative and an employer settle between them a matter of interpretation or enforcement of a collective agreement "they are bargaining collectively in a true sense." Of course, if the disposition of such matters by agreement between a representative of the entire employee group and an employer is collective bargaining then disposition by agreement between individual employees and their employer is individual bargaining. Under collective bargaining, the collective power of the exclusive representative is utilized to safeguard the gains already won, to protect against diminution of the employer's obligations through the disintegrating process of one-sided interpretation, to compel adherence to the terms of the agreement, and to secure adequate redress for violations.[21]

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[20] "Many of the cases handled through grievance procedure may involve similar questions. Such similar cases may frequently be settled more speedily by references to previous decisions. Often the steward will be able to agree on settlements in line with precedents already established. These precedents . . . may develop over a period of years into a body of industrial common law supplementing the basic contract." U. S. Dept. of Labor, Division of Labor Standards, Bull. No. 60, Settling Plant Grievances, Gov't Print. Off. (1943), pp. 37-38. "The rules and regulations first set forth in the contract are elaborated and changed" in the day to day application of the agreement, thus evolving "into a body of industrial common law . . ." Golden, Clinton S. and Ruttenberg, Harold J., op. cit. *supra*, note 8, p. 43; Block, Louis, *Labor Agreements in Coal Mines* (New York, 1931), p. 31; Daugherty, op. cit. *supra*, note 2 (1938 ed.), pp. 452-453; Dash, op. cit. *supra*, note 12, pp. 3-5.

[21] Mitchell, op. cit. *supra*, note 5, p. 5; Hoxie, op. cit. *supra*, note 1, pp. 291-292; Lester, op. cit. *supra*, note 12, pp. 626-627; Webb. op. cit.

To handle questions involving interpretation and enforcement of the collective agreement, exclusive representatives and employers universally include in collective agreements a grievance procedure.[23] Establishment of such a procedure may, and in fact does, precede adoption of other standards dealing, for example, with wages and hours.[24] Once an exclusive representative has been selected by the employees and recognized by the employer, until a formal contract is executed, all day to day issues which arise are handled by the parties as "grievances." [25]

To facilitate their disposition the parties agree on a system, usually involving several stages, through which complaints may pass. Thus, for example, it may be provided that a grievance shall be first discussed between the union shop steward representing the employee, and the foreman, representing the employer. If the matter is not settled at this stage, the next step may be consultation between the union grievance committee and the general superintendent. If the parties are unable to agree at this stage it may be provided that the issue shall be taken up by the chairman of the grievance committee or the union president, and the employer's chief personnel officer.[26]

Following execution of a collective agreement the grievance machinery normally continues to function as the procedure through which all questions which arise during the duration of the agreement are presented and settled. Experts in trade union practice and procedure recognize, however, that a distinction should be drawn, for the purpose of guiding the atti-

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supra, note 2, pp. 203-204; Pierson, op cit. *supra*, note 16, pp. 13, 31, see also note 12, *supra*.

[23] Hoxie, op. cit. *supra*, note 1, pp. 264-265; Leiserson, op. cit. *supra*, note 5, pp. 48-49; Twentieth Century Fund, *Labor and Government* (New York, 1935), pp. 44-49; Dickinson, Z. Clark, *Collective Wage Determination* (New York, 1941), pp. 18-19; Pierson, op. cit. *supra*, note 16, p. 12; Peterson, op. cit. *supra*, note 12, pp. 231-232; U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 686, *Union Agreement Provisions* (Wash. 1942), p. 145.

[24] Twentieth Century Fund, *Labor and Government* (New York, 1935), pp. 46-47.

[25] See, e.g., *Matter of Ross Gear & Tool Co.*, 63 N.L.R.B., No. 158; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 982, 984; *Matter of Wilson & Co.*, 19 N.L.R.B. 990, 994-1001.

[26] See pp. 61-62, *infra*, and note 104, *infra*.

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tude of the parties, as well as for the purpose of indicating the appropriate forum for final disposition if the parties themselves cannot reach an agreement, between grievances which involve only the interpretation or enforcement of the contract, and those which require new agreement. Questions of the former type, judicial in nature, should be resolved, it is believed, not through a process of trading or compromise, or by resort to an estimate of the economic strength of the parties but by application of the principles already agreed to between them.[26] Collective agreements widely recognize this distinction by providing that where the union and the employer cannot agree as to the proper interpretation or manner of enforcement of the agreement, the issue is to be submitted to arbitration as the final step in the grievance procedure, and that when the parties cannot come to agreement with respect to a question not covered by the contract or involving a formal change in the terms of the contract, the issue is to be resolved in the same fashion as the making of a new contract.[27] Often contracts further provide that there shall be no resort to economic conflict during the life of the agreement, and these usually make the decision of arbitration binding on the parties. If bargaining fails to bring the parties to a meeting of the minds on a "new" question, it remains unsolved until the agreement expires and the parties become free to resort to their economic strength to resolve it.[28]

To the arbitrator under such agreements is delegated the judicial power of the employer and the exclusive representative to the extent they cannot by mutual agreement resolve all judicial questions.[29] The role of the exclusive representative

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[26] Webb op. cit. *supra*, note 2, pp. 182-184; Golden and Ruttenberg, op. cit. *supra*, note 8, pp. 95-99; Pierson, op. cit. *supra*, note 16, pp. 20-21; Hoxie, op. cit. *supra*, note 1, pp. 266-267.

[27] Webb, op. cit. *supra*, note 2, pp. 192-194, 226-230; Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 48-49; Pierson, op. cit. *supra*, note 16, p. 13; Mitchell, op. cit. *supra*, note 5, pp. 12-18, 20-21, 28-30, 33; U. S. Dept. of Labor, Bull. No. 60, op. cit. *supra*, note 20, pp. 5-6, 24-25.

[28] Webb, op. cit. *supra*, note 2, pp. 184-185, Pierson, op. cit. *supra*, note 16, p. 29.

[29] Contemporary writers all emphasize the point that the arbitrator is not a substitute for day-to-day collective bargaining under the grievance machinery but is merely to "resolve those disputes under a contract" which the union and the employer, "after exhaustive effort, cannot them-

in arbitration proceedings under a collective agreement is that of a party to a law suit. The arbitrator is only called upon to resolve disputes between the union and the employer as to the interpretation and application of the contract. The representative is in a position to explain to the arbitrator, from the viewpoint of the employees as a whole, the considerations which led to adoption of the provision in question and to explore the effects of adoption of various possible interpretations. Moreover, participation of the exclusive representative is essential to secure for the employees the advantages of expert advocacy available to the employer.

Trade union practice sometimes mirrors the distinction in methods of final resolution of legislative and judicial issues at earlier levels of negotiation and adjustment. Thus, legislative questions may be handled by negotiation between management and a "bargaining committee" of the union, and judicial questions between management and a "grievance committee." [30] On the management side, different officers may be designated to act in each type of matter. This practice readily explains the development of a connotation for the term "grievances," far more narrow than its original usage in collective bargaining as synonymous with complaints.

While the distinction between legislative and justiciable questions in collective bargaining is important for the purpose of guiding the approach of the parties and the ultimate mode of disposition of questions, it must be borne in mind that the distinction is not capable of mechanical application. Often disputes arise concerning whether a particular question should be treated as legislative or judicial, and the arbitrator may be called upon to make a preliminary determination on this point.[31]

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selves resolve." Shulman, op. cit. *supra*, note 12, pp. 7-8. See also Dash, op. cit. *supra*, note 12, pp. 3-5; Taylor, George W., op. cit. *supra*, note 12, pp. 11-13.

[30] Webb, op. cit. *supra*, note 2, pp. 194-206; Pierson, op. cit. *supra*, note 16; pp. 29-30; U. S. Dept. of Labor, Bull. No. 60, op. cit. *supra*, note 20, pp. 35-37; Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1935), p. 459.

[31] Cf. Rules and Plan of Procedure Adopted by the Board of Grievances, Article 21, as printed in Winslow, Charles, Industrial Court of the Cloak, Suit and Skirt Industry of New York City (U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 144, 1914), p. 14: "Whenever, in the opinion of the board of grievances, a general situation arises requiring adjustment by both organizations, or revision or amendment of the protocol,

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If he is of the opinion that the question cannot be resolved by reference to agreements already made he may refer the question back to the parties for negotiation.[22] Even where the distinction is applied with such strictness, and frequently it is not, there may be a limited amount of legislation in the judicial process. It may be used to supply details omitted from the contract where, to use the language of this Court, "no effort is made to bring about a formal change in terms or to create a new one" (slipsheet, p. 10). The distinction is much the same as that made in the common law system in which a reserve of legislative powers remains in the courts.

Apart from the somewhat nebulous distinction between legislative and judicial questions, collective bargaining neither in theory nor in practice, has drawn any line between grievances on the basis of their prospective or retrospective character. On the contrary, it is recognized that the settlement of a grievance involving interpretation or enforcement of a contract may have effects far more important for the future than for the immediate situation which gave rise to the question. Thus, while the occasion for consideration of a problem of interpretation or enforcement is normally a claim that the employer has either done or failed to do something required by the contract, for example, that the employer by promoting one employee rather than another has failed to follow the seniority system set forth in the contract, the terms of settlement will affect all of the employees in the unit, whenever, during the remainder of the contract promotions are to be made. Similarly, when a grievance arises concerning a matter not covered in the contract, and the parties are called upon to establish a new rule

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it shall call a conference of both organizations by duly authorized representatives to consider and discuss such matters."

[22] The Agreement between General Motors Corp. and UAW-CIO, June 3, 1941, Article 46, provided: "The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto;" etc. In Umpire Decision No. A-97, "Hiring Rate for New Employees" (June 13, 1941), under this agreement, the umpire refused to pass upon a new scale of hiring rates, referring the issue back to the parties without decision, and adding: "The Umpire strongly recommends, however, that the problem discussed herewith be carefully considered by the parties by collective bargaining procedure." Cf. Spencer, William H., The National Railroad Adjustment Board, 11 Uni. of Chi. Journal of Business, No. 2, Pt. 2 (May 1938), pp. 30-31.

to cover the situation, the rule will normally be applied not only to settle grievances of a similar character which might arise in the future but also to dispose of the then pending case or cases which were the occasion for adoption of the rule."

Both prospective and retrospective aspects of grievance settlements invariably affect the collective interest of the entire group of employees, no matter how narrow the matter involved may appear at first glance. Seldom, indeed, does a grievance arise which is based upon some factor of personality or circumstance peculiar to a single employee. Even if there could be assurance that no other employees would in the future seek adjustment on the same ground, the settlement would be of interest to the group, for it would indicate the extent to which the employer is willing to take cognizance of, and make allowance for, difficulties arising out of deviations from the norm. From still another point of view the settlement of every grievance affects the employees as a group. The sum available for allocation by any business enterprise to the cost of labor is not unlimited. To the extent, therefore, that the settlement of any grievance involves an increase in labor cost, it decreases, *pro tanto*, the employers' ability to settle other grievances on favorable terms. The exclusive representative is, and must be, therefore, as vitally concerned in the retrospective as in the prospective phases of grievance adjustment.

The foregoing illustrations suggest one of the major problems inherent in the substitution of bargaining through a collective representative for bargaining by individuals, to wit, who shall represent the group, and, if the interests of all employees do not coincide, what position shall the representative take. When faced with the problem of adopting a blanket rule for resolving these questions, the trade union movement, again following the political analogy, urged utilization of the principle of majority rule. The role ascribed to the individual employee in the industrial democracy created by collective bargaining is held to be the same as the role of the citizen in political life. In that role, a majority of the employees determine both the identity of the representative and its policies. The choice of the majority is binding upon all, for the represent-

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" See authorities cited note 20, *supra*.

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ative selected is the representative of all, not merely of the majority. Were minorities free to repudiate decisions of the majority representative government could not survive either in the industrial or in the political world.

Political analogy, by the same token, supplies the key to the rights of minorities and individuals. Familiar democratic concepts mark the outposts of legitimate exercise of governmental power in the industrial, no less than in the political world. The representative is bound to refrain from discrimination against them, and to permit the minority full opportunity, through discussion and solicitation, to become the majority. In addition, individuals, as well as minorities, are accorded the inherent right, in the words of the federal Constitution "to petition the Government for redress of grievances." Since under the system of collective bargaining, governmental power in industry is vested not in the employees' representative alone, but is divided between the employer and the representative, this right permits both individuals and minorities to present their claims to the employer as well as to the employee representative. Just as the citizen may petition the legislature, the executive, and the judiciary for correction of some claimed injustice or inequity, so may the employee present his grievance to any of the repositories of governmental power created by the employer and the exclusive representative, regardless of the nature of the grievance, and without regard to whether the exercise of legislative, executive, or judicial power is necessary to satisfy his claim.

The division of governmental power between employer and employee representatives tends to cast the executive and judicial agencies of industrial government, as well as the legislative agency, into bipartisan molds. Normally, the individual or group which wishes to press a grievance will bring the matter to the attention of either the officers of the exclusive representative charged with handling such matters, or to the attention of the constituency as a whole. If successful in obtaining majority support for the claim at this stage, the individual's claim becomes the claim of the group and is disposed of by the appropriate officials of the representative acting in conjunction with the designated officials of the employer. If the

claimant is unsuccessful, the exercise of the right of petition permits him to present his case to the agency of industrial government composed of the representative and the appropriate officers of the employer. If upon such presentation the employer sees no merit in his claims, there is, of course, no further remedy, except to return to the employees and attempt to induce a majority to change their position. If, however, the employer representatives find merit in the claim, they will then urge their views on the matter to the officials of the employees' representatives who sit with them as part of the appropriate agency and dispose of the matter by joint action with them. Since all parts of the industrial government are bipartisan, all of its acts, including both legislative and judicial, take the form of agreements between the employer and the employee representative. However, although the bipartisan decisions disposing of grievances are often reduced to writing, the term, "collective bargaining agreement," is usually restricted to the formal legislative contract.

In sum the theory and practice of collective bargaining require the view that the representative chosen by the employees *is* the employees in all aspects of the process in which working conditions are established and enforced. Individual employees may be heard jointly by the representatives and the employer, but establishment and enforcement of the terms of employment, generally and specifically, is the function of the employer and the employee representative alone.

II. CREATION OF A LEGAL SYSTEM COMPATIBLE WITH THE PRINCIPLES OF COLLECTIVE BARGAINING REQUIRED REJECTION OF THE COMMON LAW CONCEPTS WHICH THE COURTS HAD APPLIED TO INDUSTRIAL RELATIONS.

The courts operating under common law principles in considering collective bargaining ignored the basic economic and political premises upon which the system is predicated. Prior to the enactment of legislation, the courts, of course, never forced employers to bargain with unions. The courts' contact with the collective bargaining process in the main stemmed from controversies involving the enforceability of collective agreements voluntarily entered into between an employer and

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a union, and the relation of such agreements to contracts between the employer and individual employees.

To the resolution of these problems the courts brought only [illegible] ficiary,[35] and freedom of contract.[36]

Application of these concepts led to uniform preservation to individual employees of the right to contract with their employer. When the union entered into a bargaining contract with the employer, the employee only became entitled to its benefits if he could establish that he and the employer had adopted the terms of the collective agreement as the terms of the relationship between them.[37] Finally, contracts executed between such a representative and the employer, even though purporting to cover all of the employees, were considered binding only upon those who had authorized the representative to act for them or who had ratified its acts.[38]

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[34] *Shelley* v. *Portland Tug & Barge Co.*, 158 Ore. 377, 76 P. 2d 477; *Ahlquist* v. *Alaska-Portland Packers' Assn.*, 39 P. 2d 348 (C.C.A. 9); *Clark* v. *Claremont Apt. Hotel Co.*, 19 Wash. 2d 115, 141 P. 2d 403; *Gulla* v. *Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952.

[35] *Huston* v. *Washington Wood & Coal Co.*, 4 Wash. 2d 449, 452-453, 103 P. 2d 1095, 1097; *Individual Damp Wash Laundry Co.* v. *Meyers*, 10 Ohio Op. 517; *Sublett* v. *Henry's Turk and Taylor Lunch*, 123 P. 2d 844, aff'd 21 Cal. 2d 273, 131 P. 2d 369, 56 Harv. L. Rev. 294; *Yazoo & M. V. R. Co.* v. *Sideboard*, 161 Miss. 4, 133 So. 669; *Helt* v. *Britten-Fenton Co.*, 180 Misc., 1077, 44 N. Y. S. 2d 58.

[36] See Witmer, T. Richard, *Collective Labor Agreements in the Courts* (December, 1938), 48 Yale L. J. 195, 227-239; Lenhoff, Arthur, *The Present Status of Collective Contracts in the American Legal System* (May, 1941), 39 Mich. L. Rev. 1109, 1143-1150; Braun, Kurt, *The Dual Nature of Collective Agreements* (October 1943), J. Pol. Econ. 451, 454-457.

[37] In *Langmade* v. *Olean Brewing Co.*, 137 App. Div. 355, 121 N. Y. Supp. 388, the plaintiff, a union member, had been told he could quit if he was not satisfied at receiving less than the union's agreement provided. In denying him recovery the court stated at 357, 121 N. Y. Supp. at 390: "It is probably true that the contract entered into by the defendant with the union can be read into the agreement with the plaintiff *(Keysaw* v. *Dotterweich Brewing Co.*, 121 App. Div. 58). The existence of that agreement, however, did not prevent the parties to this action from regulating the compensation to be paid to the plaintiff. They could make an independent agreement disregarding the one with the union, and they did that." Cf. *Yazoo & M. V. R. Co.* v. *Webb*, 64 F. 2d 902 (C.C.A. 5); *Dierschow* v. *West Suburban Dairies*, 276 Ill. App. 355; *Ryan* v. *Ryan*, 156 Kan. 348, 133 P. 2d 119; *Mastell* v. *Salo*, 140 Ark. 408, 215 S. W. 583.

[38] *McGregor* v. *Louisville & N. Ry.*, 244 Ky. 696, 51 S. W. 2d 953; *Piercy* v. *Louisville & N. Ry.*, 198 Ky. 477, 248 S. W. 1042; *McCoy* v.

Collective bargaining, patently, could not flourish in so hostile a legal climate. The premise that inequality of bargaining power between individual workers and employers made freedom of contract a myth, demanded as a corollary, withdrawal of legal sanction from the individual contract.[39] The premise that equality of bargaining power could be restored only if the workers acted as one man, required rejection of the concept of the representative as an agent of individual employees and substitution of a concept in which the representative was accorded a status similar to the status of a political representative. This meant that the representative could exercise the power of all the employees involved on behalf of all, whether or not each individual had under agency principles given the representative an authorization to represent him. It required adoption of a test for determining when collective bargaining should replace individual bargaining. Acceptance of the governmental analogy in turn pointed to majority rule as that test. Statutory adoption of majority rule required further the establishment of a method for determining whether a majority of a group of employees had decided to make the change to collective bargaining and of ascertaining the representative chosen. It required recognition that once such substitution was made, the power to contract and bind the group and each individual in it vested exclusively in the representative chosen by the group and that individuals could not either themselves or through another agent contract with the employer on any subject involving the employment relation. Finally, it required recognition of the collective agreement as a bi-party contract between the employer and the exclusive representative.

St. Joseph Belt Ry., 229 Mo. App. 506, 77 S. W. 2d 175; *Earle* v. *Illinois Central R. R.*, 25 Tenn. App. 660, 167 S. W. 2d 15; *Panhandle & S. F. Ry.* v. *Wilson*, 55 S. W. 2d 216 (Tex. Cir. App.).

[39] The cases bear out the economists conclusions that the employee is regularly exploited under individual bargaining. Thus, in the *Huston* case, *supra*, note 35, it was held that a collective agreement for a higher rate of pay did not supersede a prior individual contract for a lower rate, whereas in the *Langmade, Shelley, and Sublett* cases, *supra*, notes 34, 35, and 37, it was held that individual contracts for a lower rate of pay superseded prior collective agreements for a higher rate.

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III. IN THE RAILWAY LABOR ACT CONGRESS ADOPTED THE CONCEPTS OF COLLECTIVE BARGAINING WHICH EXCLUDE INDIVIDUAL BARGAINING RESPECTING GRIEVANCES.

National labor policy during the past 25 years reflects Congressional recognition of the validity of the premises upon which the system of collective bargaining rests. The history of that policy is one of progressive encouragement of the growth of collective bargaining and its practices and procedures, by establishment of the legal climate and administrative machinery necessary to the successful operation of the system.

One facet of that policy, embodied in the Railway Labor Acts of 1926 and 1934, the Norris-LaGuardia Act of 1932, and the National Labor Relations Act of 1935, has been the protection, against interference by employers and by the courts, of the right of employees to organize for the purposes of collective bargaining. Another facet, immediately pertinent in the instant case, has been the imposition upon employers of an affirmative duty to bargain collectively, i.e., to recognize the transference of power to contract from individual employees to the representative of all. Finally, as the method for determining when that duty arises, i.e., when collective bargaining shall replace individual bargaining as the system of government in particular enterprises, Congress adopted the principle of majority rule and created administrative agencies charged with the duty of its application. These aspects of federal policy, incorporated in the Railway Labor Act of 1934, as well as in the National Labor Relations Act, as this Court has pointed out, "absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346; cf. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 523-526.

A. The Terms of the Railway Labor Act Respecting the Powers of the Statutory Representative

While the objective of federal policy, establishment of the practice of collective bargaining, is the same in the railroad

field as in industry generally, Congress necessarily adopted different techniques for defining the obligations of the parties to the collective bargaining relationship in the Railway Labor Act and in the National Labor Relations Act. Since it found it desirable to establish an administrative agency to interpret and enforce the latter, it was not necessary for it to spell out in that statute the full content of the collective bargaining obligation; it was enough merely to require employers to "bargain collectively" (Section 8 (5)). No such administrative agency was created to interpret and enforce the Railway Labor Act; hence, Congress provided a detailed description of the duties of the parties. In addition, concern over the serious consequences of strikes in the railroad industry led Congress to supplement the bargaining procedures voluntarily established by the parties with agencies designed to serve as terminal steps in the collective bargaining process, thereby eliminating, so far as possible, the danger of a failure of the parties to reach a peaceful accord. Recognizing that the labor movement distinguishes for purposes of approach and ultimate modes of disposition between grievances involving legislative questions and those involving judicial or administrative questions, Congress provided separate agencies for the purpose of handling the two types of disputes at the final stage. Thus, the Railway Labor Act confers jurisdiction over all "disputes concerning rates of pay, rules or working conditions not adjusted by the parties in conference," upon the Railway Mediation Board (Section 5 First (a)), and confers jurisdiction over all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" as to which no adjustment has been reached by the parties upon the National Railroad Adjustment Board (Section 3 First (i)).

That the distinction so common in the labor world between disputes requiring new agreement between employers and unions, and disputes requiring only interpretation or application of agreements was adopted by Congress solely for the purpose of defining the respective jurisdictions of these agencies and was not intended to limit the scope of collective bargaining or to detract from the duty of employers to recognize in the

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employee representatives exclusive power to conclude agreements on all matters in dispute is obvious from the terms of the legislation. Like the National Labor Relations Act, the Railway Labor Act vests in a majority of the employees involved the power to determine who shall be the representative of all and compels employers to recognize and bargain with the representatives thus selected. Section 9 (a) of the National Labor Relations Act declares that the representatives so selected "shall be the exclusive representative of all employees . . . *for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment*" (Italics added). Section 2, Paragraphs Fourth and Ninth of the Railway Labor Act, which contain the corresponding provision for majority rule provide—

> Fourth: Employees shall have the right to organize and *bargain collectively* through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class *for the purposes of this Act*. . . .
>
> Ninth: . . . Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class *for the purposes of this Act*. . . . (Italics added).

While the first sentence of Paragraph Fourth, with its specific reference to the right to "bargain collectively," would in itself indicate that representatives selected by the majority under that Act, as under the National Labor Relations Act, automatically preempt all power to negotiate and contract with employers on all matters affecting wages, hours, and working conditions, the reference in both passages to "the purposes of this Act," which are set forth in Section 2, leaves no room for doubt on this score. For Section 2, headed "General Purposes" declares that the Act is designed, *inter alia*, "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Since the settlement of both types of disputes are

thus included in the purposes of the legislation, it is perfectly clear that the representative of the craft or class chosen "for the purposes of this Act" has, under Paragraphs Fourth and Ninth, equally plenary authority over both subjects, and that the carrier's duty to treat with the exclusive representative extends, as well, to both.

This interpretation is further supported by Paragraphs Second and Sixth of Section 2 of the Railway Labor Act. Paragraph Second provides that "*all* disputes . . . shall be considered and *if possible decided* . . . in conference between representatives designated and authorized" by the parties interested in the dispute. There is no differentiation between disputes involving legislative questions and those involving the interpretation or application of agreements in the requirement that there be conferences between authorized representatives, and that such representatives shall if possible decide the questions. Paragraph Sixth implements the requirements imposed upon carriers and exclusive representatives in Paragraph Second with respect to the procedure for handling disputes which the statute classifies as arising "out of grievances or out of the interpretation or application of agreements." It provides that in case of such disputes "it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees . . . to specify a time and place at which such conference shall be held. . . ." The structure of the legislation thus demonstrates adoption by Congress of the principle that disputes of all types between carriers and employees, those involving "disputes arising out of the interpretation or application of agreements," as well as those involving the making or amendment of agreements concerning wages, hours, and working conditions, shall be the subject of collective bargaining between the carrier and the exclusive representative of the employees involved.

We submit that in view of the provisions described above, no difference in the power of the statutory representative with respect to the two types of dispute should be made on the basis of implication. Certainly if Congress had intended that the representative have two different kinds of power, it would have said so in no uncertain terms. The Court, in its opinion

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in the instant case, has recognized that the power of the representative with respect to legislative matters is "exclusive" but has held that the Act does not expressly state whether the representative enjoys similar exclusive powers regarding judicial and executive matters (slipsheet, p. 14). We believe that the statutory grant of power is just as express in the one case as in the other and that the very provisions which grant the admittedly exclusive legislative power apply equally to judicial and executive matters. In *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, which the Court cited as authority for its statement of the exclusive legislative power of the representative (slipsheet, p. 14), the provisions of the Act relied on were Section 2 Third, Fourth and Ninth (300 U. S., at p. 548). These sections make no distinction between the two types of dispute and apply equally to both. They cannot be given different meanings dependent on the type of dispute involved.

B. The Legislative History

1. The failure of Congress to limit the power of the statutory representative under the Railway Labor Act to settle grievances.

The legislative history of the Railway Labor Act, moreover, indicates that Congress rejected suggestions which would have limited the power of the exclusive representative to legislative matters and would have reserved to individual bargaining those matters involving the exercise of judicial and administrative powers which the statute defines as grievances (see note 14, *supra*). A suggestion was advanced in the course of hearings on the bill by Federal Coordinator of Transportation Eastman and Mr. George M. Harrison representing the Railway Labor Executives Association, that the selection of exclusive representatives by a majority of any craft or class should be only "for the purposes of making and revising agreements concerning rates of pay, rules, and working conditions" and that employees should be free to engage in individual bargaining, i.e., to represent themselves, or to select any agent they pleased to represent them, in negotiating with employers on issues involving interpretation or application of agreements. (Hearings before the House Committee on Interstate and Foreign Com-

merce, on H. R. 7650, 73rd Cong., 2d Sess., pp. 44, 83, 85, 89). This suggestion, avowedly advanced in the interest of safeguarding the rights of individuals and minorities against adverse action by the exclusive representative, was never adopted. We submit that its rejection is attributable to realization by Congress and perhaps by the sponsors themselves who never put this suggestion in the form of an amendment, that such a restriction upon the function of the exclusive representative would be wholly incompatible with the principles and practice of collective bargaining; that it would completely fail of its purpose of protecting individuals and minorities against unfavorable action by the exclusive representative since it afforded no safeguard against such action when taken in connection with the formation and revision of agreements; that it would, by freeing the employer of the obligation to bargain with exclusive representatives as to "grievances," recreate, as to those matters, the very inequality of bargaining power which it was the object of the legislation to destroy; and that protection of the rights of individuals and minorities, was to be achieved, if at all, within the framework of the majority rule principle and the political analogy upon which its adoption was based (*infra*, pp. 45-58). Not one word in the statute can be construed as supporting a construction which would restrict the scope of collective bargaining or the authority of the exclusive representative to contract with the employer.

2. The Failure of Congress to Limit the Power of the Statutory Representative under the National Labor Relations Act to Settle Grievances.

a. The Terms of the National Labor Relations Act.

The foregoing interpretation of the failure of Congress to embody in the Railway Labor Act amendments restrictive of the authority of exclusive representatives to bind individuals and minorities with respect to all matters affecting terms and conditions of employment, is fortified by the corresponding provisions of the National Labor Relations Act and their legislative history. In that Act Congress did not distinguish at all between the legislative, executive, and judicial phases of collective bargaining and the reason for its failure to do so is

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clear; there was no attempt to create tribunals supplementary to the grievance machinery which the parties would establish in the normal course of collective bargaining, in which connection alone, such a distinction would be meaningful.

Section 8 (5) of the National Labor Relations Act compels the employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)." Section 9 (a) as noted above (p. 33), adopts the principle of majority rule and makes it clear that the representative selected is to have plenary authority to bargain and contract about all "rates of pay, wages, hours of employment, or other conditions of employment." But Section 9 (a) goes further, and in conjunction with its adoption of the majority rule principle, spells out one of the limitations upon the power of the majority, inherent in the principle as it has developed in the political world, i.e., the right of individuals and minorities to petition the Government for redress of grievances. Thus, the proviso to that Section declares "that any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

At the outset it should be noted that the Act itself bears internal evidence that Congress considered grievances to be synonymous with the subject matter of collective bargaining (see note 14, *supra*). First, Section 2 (5) of the Act defines the term, "labor organization," as "any organization . . . in which employees participate and which exists for the purpose . . . of dealing with the employers concerning," *inter alia*, "grievances." Second, the Section 9 (a) proviso which preserves to individuals or groups of employees the right at any time to present grievances is attached to the provision which guarantees to the representative of the majority the right to act as exclusive representative for the purposes of collective bargaining. If Congress had not considered the disposition of grievances to be a function of collective bargaining it would certainly not have included this proviso in the section dealing with collective bargaining. It would have considered that Section 9 (a) did not affect the right of employees to bargain individually with respect to grievances, and *a fortiori*, would not deprive them of the right to present grievances.

b. The legislative history of the proviso to Section 9 (a) of the National Labor Relations Act.

The legislative history of the proviso to Section 9 (a) of the National Labor Relations Act reveals that the term "grievances" as used therein covers a much broader field than the restricted area accorded to it by definition for an entirely different purpose in the Railway Labor Act; that the connotation of the term grievances, as used in the proviso, was that which it possessed in the labor field generally, as synonymous with all complaints which might be the subject of bargaining between employers and employees; that the origin of the proviso lay in the desire to preserve to individuals and minorities the same character of right in industrial democracy as they possessed in political democracy, to petition the Government for redress of grievances; and that the proviso was in no sense intended to reintroduce the evils of individual bargaining into the framework of industrial government. Specifically, Congress intended in the proviso to Section 9 (a) to reserve to individuals and minorities the right to present grievances to the employer for discussion without detracting from the duty of the employer to recognize in the exclusive representative the sole power to contract concerning their disposition.[39a]

When Senator Wagner in 1934, introduced S. 2926, the forerunner of the present Act, the bill contained no provision analogous to Section 9 (a); it did not provide for majority rule and hence made no mention of the right of individuals and minorities to approach the employer. At the hearings on the bill, one of the witnesses suggested specific incorporation of a majority rule provision.[40] Seconding this proposal Professor Edwin E. Witte of the University of Wisconsin, raised the question of what rights should be reserved to individuals and minorities under such a rule. He testified as follows: [41]

[39a] The legislative history as it is here presented has been set forth by the National Labor Relations Board in *Matter of U. S. Automatic Co.*, 57 N.L.R.B. 124, 135, and *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 992-994. See also Weyand, Ruth, *Majority Rule in Collective Bargaining* (July 1945), 45 Col. L. Rev. 556, 584-587.

[40] Hearings before Senate Committee on Education and Labor on S. 2926, 73rd Cong., 2d Sess., pp. 227-228.

[41] Hearings on S. 2926, 73rd Cong., 2nd Sess., pp. 243-244.

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> In industrial government, just as in political government, there has to be majority rule, when it comes to actual government. The only type of representation that individuals can have is the right of petition. The right of petition, the right to lay grievances before Congress is a right that any individual and every group must have. Similarly, in industrial government, the right of petition, the right to lay grievances before the employer seems to me is a right that every group should be accorded, and every individual. . . . What is contemplated is merely a right to present a point of view. . . .
>
> It certainly is placing no burden on the employer to meet with representatives of any group of employees that have a grievance or wish to take up some matter with him, but obviously he cannot bargain with every group of employees or with individuals. There cannot be any sort of industrial government whatsoever under those conditions.

Thus the very witness who first proposed insertion in the bill of a provision for the reservation of rights to individuals and minorities under majority rule, recognized that those rights should be no more than the right "to present a point of view"; and argued that only such a right was fully consistent with democratic practices as illustrated by the constitutional guarantee of the right to petition for redress of grievances.

As thereafter reported out by the Senate Committee on Education and Labor, the bill empowered the National Labor Relations Board to give effect to the principle of majority rule and contained a proviso "that nothing in this Act shall be construed to prohibit an employer from discussing grievances with an employee or groups of employees at any time." In describing, in its report, the right resulting to employees from this grant to employers of the right to discuss grievances with them, the Committee said "the minority have a right through representatives or otherwise to present grievances to their employer." [42] Thus, the first use of the term "present" in connection with the right of individuals and minorities, was clearly intended to mean present only for the purpose of "discussing," the term used in the committee bill.

In the interim between this committee report and the introduction by Senator Wagner of S. 1958 on February 21, 1935,

[42] S. Rep. No. 1184, 73rd Cong., 2d Sess., p. 8.

the National Labor Relations Board established under Public Resolution No. 44 [45] adopted the principle of majority rule as more fully described below (*infra*, p. 50). It stated that adoption of this principle did not deny "to any employee or groups of employees the right to present grievances, to confer with their employers, or to associate themselves and act for mutual aid or protection." [46] Commenting on this interpretation of majority rule, Lloyd K. Garrison, Dean of the University of Wisconsin Law School, remarked: "The rights of the minority are amply protected [under majority rule] by assuring them free access to confer with the employer, and to present grievances. The minority, in fact, are benefited by placing upon the employer the duty to bargain exclusively with the majority, for it is only under such circumstances that better terms for the employees, including the minority, are at all likely to be obtained." [47]

When S. 1958, the bill which eventually became law, was introduced, it embodied the interpretation advanced in the 1934 committee report on S. 2926. Since the proviso was cast in terms of rights of employees rather than of rights of employers, it used the word "present." The proviso in full read as follows:

> That any individual employee or group of employees shall have the right at any time to present grievances to their employer through representatives of their own choosing.

In his statement accompanying the bill Senator Wagner described the proviso as according to minority groups the right to "be heard." [48]

Chairman Walsh of the Senate Committee likewise made it clear that the right being preserved to individuals and minorities was the right "to present their views"; [49] that this right extended not only to executive and judicial questions which might arise in the course of administering a collective agree-

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[45] 48 Stat. 1183.
[46] *Matter of Houde Engineering Corporation*, 1 N.L.R.B. (old) 35, 43.
[47] "7-A and the Future," *Survey Graphic*, February 1935, pp. 56-57.
[48] Hearings on S. 1958, 74th Cong., 1st Sess., p. 43. See also 78 Cong. Rec. 12018-12019.
[49] Hearings, p. 323; see also p. 43.

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ment, but also to legislative questions, in the final disposition of which, of course, these groups could have no part. He stated that after as well as before "any agreement for collective bargaining can be entered into [the minority] may be heard by the employer." [48] He further emphasized the broad scope of this right to be heard in the course of a colloquy with Witness Walter Gordon Merritt, who objected that the term "grievances" used in the proviso to describe the matters on which minorities could be heard was "a pretty narrow word," and argued that "present their 'views' would be a far better word, if that is their intention." To this objection the Chairman replied that the text of the proviso meant that "the minority could be heard, too, perhaps not at the time the majority was being heard, but that they could present grievances before or after the contract was made," and insisted that the term "grievances" was appropriate to describe the subject matter as to which employees might be heard because "It is assumed, of course, the thing in collective bargaining is that the employers and employees are dealing with grievances." [49] In response to Merritt's further objection that the proviso "does not permit the others [minorities] to sit in on the collective bargaining end of it," Senator Walsh stated: [50]

> As I understand it, it does not permit them to sign separate agreements, and it does not permit them to be parties to the signature of a contraact, but I do not think there is anything to prevent them from being fully heard in every other step, save that of final execution of the contract.

When Merritt persisted in his objection the Chairman further explained: [51]

> I did not think it was the intent of the proponents of this legislation and I do not think it was the intent of the proponents of this language not to permit groups to present grievances, nor was it intended to debar the minority groups from sitting in if the employer and the majority were willing, but in any event of their not sitting in any

[48] Hearings, pp. 318-319; see also p. 323.
[49] Hearings, p. 323.
[50] Hearings, p. 320.
[51] Hearings, p. 321.

> negotiations that they be separately heard by the employers and their grievances or their suggestions received, and in turn presented by him to the majority group. I did not think there was anything in this bill that prevented any or all groups from getting in to the employer their views and opinions prior to the signing of the contract between the employer and the majority group of employees.

Further explaining the intent of the proviso that no "minority group should be denied the right to present grievances, if that word is there, or present their views," Senator Walsh posed a hypothetical case.[52]

> Suppose a contract is entered into by a majority of the employees and an employer, and it omitted to properly protect or properly settle some great injuries that the workmen outside the plant, who have charge of the property of the company, who were the gardeners and the repairmen on the outside of the building, let us say, and they are employees, of course, of the company, why should not they be permitted before the agreement is made, or after the agreement is made, whether they are of a minority union or an independent union, or only just ordinary employees, to press upon the employer the rights as they see them, and urge that in any contract that is made that proper stipulation should be made for their working hours, and the definition of the conditions under which they work, either before or after?

In a colloquy with another witness Senator Walsh stated: [53]

> The bill also provides that . . . your employees . . . can elect representatives . . . and these representatives will be the spokesmen for the other employees in meeting with you for the purpose of settling grievances that may arise. The law would require you to meet them and in good faith discuss grievances . . .

In the course of hearings before the House Committee on Labor,[54] Chairman Connery expressed himself as being "leery" of the proviso as it then stood for two reasons, first, because

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[52] Hearings, p. 324.
[53] Hearings, p. 516.
[54] The hearings were held on H. R. 6288, 74th Cong., 1st Sess., the companion Bill to S. 1958, introduced by Representative Connery on February 28, 1935.

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it might be construed to permit employers to settle grievances with minority groups, and second, because it permitted minorities to present grievances through representatives other than the representative chosen by the majority, a condition which would permit minority representatives to claim credit for suggestions originally advanced by them. Chairman Connery conceived that this would enable employers to build up company unions.

Addressing himself to the first of these problems he said that "he would like to see it so that after they [the minority] present their grievance then the matter must be taken up by the majority with the boss of the plant." [55] He proposed a further proviso as follows: [56]

> That if such grievances are presented to the employer, these grievances will be taken up by the employer and the representatives of the majority and settled.

This amendment would have imposed upon the employer the duty of referring all grievances to the exclusive representative whether or not the employer proposed taking any action on them. It would also have imposed a duty on the exclusive representative to participate with the employer in the settlement of all grievances. Objecting to imposition of such duties upon employers and unions, William Green, president of the American Federation of Labor, who was then on the witness stand, stated:

> What we wish is that it [the proviso] might state clearly that the individual employee shall be accorded the right to present grievances to his employer for adjustment. *That is about as far as it should go.* (Italics supplied.)

Chairman Connery replied: [57]

> I agree with you.

Representative Eagle, concerned with the same problem, suggested that in order to avoid the interpretation that individuals would have the right to contract with employers for the settlement of grievances, the proviso be omitted entirely,

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[55] Hearings, p. 210.
[56] Hearings, p. 211.
[57] Hearings, p. 211.

thus leaving the individual with the right to "make representations" which, he said, they would retain in any event since the Act nowhere denied it. When Mr. Green assured him that individuals retained only that right under collective bargaining, Congressman Eagle said, "Then you do not confuse the meaning of this [the proviso as written], and you will not have another Richberg decision?" [58]

Similarly, Congressman Griswold, another member of the Committee, posing the case of an individual who claimed that he had not received overtime payments in accordance with the provisions of a collective agreement for work previously performed, warned that if: [59]

> that man goes and *bargains individually* and not through the established procedure, and the *established organization,* that man has got to *break down your system by doing it alone.* (Italics added.)

With reference to the second problem, whether individuals and minority groups should be permitted to present grievances through representatives other than the majority representative, Chairman Connery remarked that if such representation were permitted, "You inject your company union just the same." [60] A similar view of the danger of permitting representation by any one other than the majority choice was taken by Congressmen Wood and Griswold.[61] During the testimony of Secretary of Labor Frances Perkins, Chairman Connery again sought to eliminate the danger of building up company unions, which these committee members deemed to lurk in that portion of the proviso which conferred upon minorities the right to select "representatives of their own choosing" for the purpose of presenting grievances. Secretary Perkins then read a proposed amendment to the proviso which eliminated the words "through representatives of their own choosing" and stated that she believed that this amendment would "take care of" the problem raised by the Chairman. When Chairman

[58] Hearings, pp. 211-212. As interpreted by Donald Richberg, General Counsel of the National Recovery Administration, Section 7 (a) of the N.I.R.A. permitted individual bargaining. (See *infra*, pp. 48-49).
[59] Hearings, p. 222.
[60] Hearings, p. 211.
[61] Hearings, pp. 211, 223.

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Connery further inquired whether it was her understanding that under the proviso as thus amended, if a minority "went to the employer and presented a grievance, the collective bargaining proposition would still have to be taken care of by the majority." Secretary Perkins replied, "That is my understanding." [62]

The Senate Committee in reporting the bill incorporated substantially the amendment proposed by Secretary Perkins.[63] This amendment was adopted by Congress [64] and appears in the bill as it was finally enacted.

3. The legislative history of both Acts respecting collective bargaining

Not only does the legislative history of the proviso itself reveal that Congress intended to preserve to the bargaining agent exclusive power to dispose of grievances by agreement with the employer but the legislative history of the adoption by Congress of the system of collective bargaining and the principle of majority rule, in the railway field as in industry generally, establishes conclusively that the proviso could not have been intended to reserve to individuals or minorities any portion of this power. In fashioning the Railway Labor Act and the National Labor Relations Act Congress clearly recognized that it was establishing a system of industrial government. It realized further that adoption of the governmental system of collective bargaining required rejection of every vestige of the antithetical system of individual bargaining. Although the Brief of the United States, p. 4, admits that the settlement of issues arising out of disputes concerning interpretation or administration of collective agreements by negotiation between individual employees and their employers is individual bargaining, the brief makes no mention of the legislative history which shows that Congress intended to outlaw all individual bargaining once the majority had chosen a representative. The omission is presumably traceable to the government's realization that this legislative history destroys com-

[62] Hearings, pp. 301-302.
[63] S. 1958, 74th Cong., 1st Sess., as reported May 2, 1935.
[64] 79 Cong. Rec. 7651.

pletely the government's entire argument in favor of individual bargaining as to grievances.

When Senator Wagner introduced S. 2926 in 1934 (*supra*), he said:[65]

> No real advocate of collective bargaining would argue that a worker should be free to bargain individually even after the overwhelming majority of his coworkers desire an agreement covering all.

At the hearings before the House Committee on Labor on the 1935 bill he stated, "Freedom for the individual worker . . . from the orderly processes of determining questions which prevail in business and in public affairs . . . is the trade name for exploitation." [66] As Francis Biddle noted in his testimony on the 1935 bill, "It is . . . academic and a little silly" to believe that individuals and minorities receive any protection by being permitted to bargain for themselves. "The purpose of the bill is to give workmen power to bargain effectively by collective action. It is obvious that they cannot do better by individual action." [67] Commissioner Eastman, testifying on the 1934 amendments to the Railway Labor Act, pointed out:

> The theory of collective bargaining is that employees cannot deal on equal terms with the employer unless they organize. They must deal collectively rather than individually.[68]

In the National Labor Relations Act Congress expressly found that this "inequality of bargaining power between employees . . . and employers" existed and "that protection by law of the right of employees to . . . bargain collectively safeguards commerce . . . by restoring equality of bargaining power between employers and employees" (Section 1). In the report which accompanied the bill the Senate Committee recognized that "the relative weakness of the isolated wage

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[65] 78 Cong. Rec. 3443; see also 79 Cong. Rec. 7571.

[66] Hearings on S. 1958, 74th Cong., 1st Sess., p. 46; see also Hearings on S. 2926, 73rd Cong., 2d Sess., pp. 8-9; Hearings on H. R. 6288, 74th Cong., 1st Sess., pp. 16, 18.

[67] Hearings, p. 81, see also the testimony of H. A. Millis, pp. 180-181, and of Charlton Ogburn, p. 151.

[68] Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess., p. 146.

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earner caught in the complex of modern industrialism has become such a commonplace of *our economic literature* . . . that it needs no exposition." (Italics added).[69] It asserted that "Congress . . . must play some part in redressing this inequality of bargaining power," [70] and concluded that "the desirability of collective bargaining as it bears upon . . . equality of bargaining power, is sufficiently well established . . . to justify its affirmance in adequate and permanent Federal law." [71] Accordingly, it stated its "objective . . . to promote . . . equality of bargaining power by encouraging the practice of collective bargaining." [72] In commenting upon its decision that collective bargaining should be instituted whenever a majority of the employees so decided, it declared: [73]

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all.

Similarly, the House Committee in its report noted that it would be "an act of interference (under Section 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups in their own behalf on the basic subjects of collective bargaining." [74]

It declared that "the bill seeks to redress an inequality of bargaining power by . . . bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees." [75]

The question whether any individual bargaining should be permitted once collective bargaining was established had been a vigorously contended issue for two years prior to the passage

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[69] S. Rep. No. 573, 74th Cong., 1st Sess., p. 3.
[70] S. Rep. No. 573, 74th Cong., 1st Sess., p. 3.
[71] *ibid.*, p. 4.
[72] *ibid.*, p. 6.
[73] *ibid.*, p. 13.
[74] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.
[75] *ibid.*, p. 16.

of the National Labor Relations Act. In introducing the 1934 bill (*supra*) Senator Wagner said: [75a]

> The second defect in Section 7 (a) has turned upon a question of interpretation. The law says that employees shall be permitted to choose their own representatives. This has been read to mean that even after the overwhelming majority in a plant desire a collective agreement covering all, the employer shall be free to deal individually with workers who want to make individual agreements.

The events referred to in this statement may be summarized briefly. The National Industrial Recovery Act, 48 Stat. 195, was passed on June 16, 1933. Section 7 (a) of that Act read in part as follows:

> Every code of fair competition, agreement and license approved, prescribed or issued under this title shall contain the following conditions:
>
> (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In August of 1933, the President established the National Labor Board to administer this provision.[76] In Executive Order No. 6580, issued February 1, 1934, the President, in order to "provide for and direct the enforcement of certain provisions of Section 7 (a)" empowered this Board to hold elections to enable employees "to choose representatives for the purpose of collective bargaining," and to publish the names of those "designated to represent all the employees . . . for the purpose of collective bargaining . . ." The order further provided that if any employer declined to recognize or deal with representatives so selected the Board should report such refusal to the Administrator for Industrial Recovery. Two days later, on February 3, 1934, the Administrator, Hugh S. Johnson, and his General Counsel, Donald R. Richberg, issued a joint statement to the effect that this Executive Order

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[75a] Hearings before Senate Committee on Education and Labor on S. 2926, 73rd Cong., 2d Sess., pp. 8-9, 17. See also 78 Cong. Rec. 3443.

[76] Lorwin, Lewis L. and Wubnig, Arthur, *Labor Relations Boards* (Washington, D. C., 1935), pp. 91-94.

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permitted individual employees and minority as well as majority groups to organize, select representatives, and bargain collectively (N.R.A. Release No. 3125). The National Labor Board promptly rejected this interpretation. In a decision issued on March 1, 1934, it construed the order as squarely adopting the principle of majority rule.[77] The Board held that the employer should bargain solely with the union which had received 353 votes in an election in which another union had received 325 votes, and in which 36 employees did not vote. An employer member dissented, stating that each union should represent the employees who voted for it and that the company should bargain individually with the 36 employees who did not vote.[78]

The divergence of views expressed by the majority of the National Labor Board on the one hand and the dissenting member of the Board, on the other, in the *Denver Tramway* case, reflected the conflict between the status accorded to collective bargaining representatives in trade union philosophy and their status at common law. The employer member's insistence upon the right of minority groups to deal through representatives other than those selected by the majority, and upon the right of individuals to bargain for themselves if they so desired whether or not a majority had indicated a desire to bargain collectively, would have meant adherence to the theory that the authority of a collective bargaining representative was no greater that that of an agent at common law, whose powers stemmed solely from the authorization of each individual or group whom the agent undertook to represent. The decision of the Board, on the contrary, sought to fashion a legal theory consonant with the philosophy of collective

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[77] *Matter of Denver Tramway Corp.*, 1 N.L.B. 64.

[78] On March 3, 1934, an Executive Order (No. 6612-A) of February 25, 1934, was made public, in which the President amended the Executive Order of February 1, by substituting as the enforcement agency for decisions of the National Labor Board, the Department of Justice, and the Compliance Division of the National Recovery Administration in place of the Administrator for National Recovery. Lorwin and Wubnig, op. cit. *supra*, note 76, pp. 108-111. This apparent victory for the view expressed by the National Labor Board as against that expressed by the Administrator was short lived. On March 25, 1934, the President announced the terms of settlement of a strike in the automobile industry among which was the adoption of a system of a proportional representation.

bargaining, a philosophy which rejected concepts of agency in favor of concepts of industrial government. Acceptance by the majority of the Board of the view that once collective bargaining is established in an industry the employees can act only through the representative selected by the majority on all matters affecting the employment relation was expressed as follows: [79]

> The [Union] was selected by a majority of those voting, both as the agency through which the employees of the Denver Tramway Corporation would collectively bargain with the management in negotiating an agreement and in the settlement of any disputes which may arise between it and its employees. Any agreement reached . . . must apply alike to all employees of the company.

As noted above (*supra*, pp. 39-40), in June 1934, Congress enacted and the President signed, Public Resolution No. 44, authorizing the President to establish Boards to investigate controversies arising under Section 7 (a). Such Boards were empowered to conduct elections among employees "to determine by what person or persons or organization they desire to be represented in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in Section 7 (a)." Pursuant to this resolution the President issued Executive Order No. 6763 on June 29, 1934, creating a National Labor Relations Board.[80] Early in its history the Board, in Matter of *Houde Engineering Corp.*, 1 N.L.R.B. (old) 35, decided July 24, 1934, approved the views enunciated by its predecessor in the *Denver Tramway* case and held that the guarantees of Section 7 (a) could not be effectuated unless the employer were required to recognize exclusive power to bargain on be-

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[79] *Matter of Denver Tramway Corp.*, 1 N.L.B. at p. 64.

[80] The executive order which established the Textile Labor Relations Board (No. 6858, issued September 26, 1934) empowered that Board to hold elections and provided that the representative selected by a majority "shall be accepted for the purpose of collective bargaining, as the representative . . . of the employees eligible to participate in the election, without thereby denying to any individual employee or group of employees the right to present grievances, to confer with their employers, or otherwise to associate themselves and act for mutual aid or protection." The Executive Order establishing the National Steel Labor Relations Board was similarly worded (No. 6751, issued June 28, 1934).

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half of all the employees in the representative selected by the majority.

When the bill which became law was pending in Congress in 1935 (*supra*, p. 40) both William Green, president of the American Federation of Labor, and John L. Lewis, president of the United Mine Workers of America, reviewed at length the controversy created by the Richberg-Johnson decision and pointed out that one of the purposes of the bill was to put an end to this controversy [81] and to thwart forever the "tendency to revert to the principle of individual contracts as between employers and employees." [82] The danger of a possible misinterpretation of the proviso which would permit continued survival of individual bargaining to any extent disturbed Congressman Eagle, who requested assurance that the proviso, as originally worded (see *supra*, p. 40) could not result in "another Richberg decision." [83] In favorably reporting the bill both the Senate and House Committees vigorously defended their adoption of the rule of exclusive representation through the majority choice; the House Committee quoting at length from the *Houde Engineering* decision, with approval.[84]

Having rejected, as we have demonstrated above, the theory that power to bind employees in negotiations with employers could or should be divided among as many representatives as the employees individually might select, and having adopted instead the theory of unitary dealing by an exclusive representative, the Congress turned to political analogy to derive the principle by which that representative should be ascertained. Majority rule, it said, is "sanctioned by our governmental practices . . . and by the whole philosophy of democratic institutions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. Thus, it realized as had the Railroad Labor Board, as early as 1921, that once it is decided that employees are to act through a single representative, "it necessarily follows, under our system of govern-

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[81] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., pp. 118-119, 190-195.

[82] *Ibid.*, at p. 195.

[83] Hearings before the House Committee on Labor, on H. R. 6288, 74th Cong., 1st Sess., p. 212.

[84] S. Rep. No. 573, 74th Cong., 1st Sess., pp. 13-14; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22.

ment, that a majority of such employees would have the right to designate their representatives." [55] Witnesses before Congressional Committees considering the Railway Labor Act and the National Labor Relations Act who supported majority rule had uniformly advanced the same justification for its adoption.[56]

Reliance upon this analogy stemmed from acceptance of the view of students of labor relations, described above (*supra*, pp. 13-20), that the fixing of terms and conditions of employment is industrial government. Commissioner Eastman, testifying on the 1934 amendments to the Railway Labor Act, said: [57]

> The minority ought to have every opportunity to air their views. As one who has dissented frequently in the past, I am strong for that; but yet I believe in the rule of the majority. Government cannot be subdivided into factions—and the labor union is really a form of government.

Similarly, Professor Witte, in his testimony on the Wagner Bill in 1934, referred repeatedly to "industrial government" and to "making laws for the industry through the joint action of employer and employee." He said, "If you have in mind making some form of industrial government you must recognize that there cannot be bargaining unless you recognize that fundamental principle of democracy, majority rule." [58] As noted above (pp. 38-39), his suggestion that employees be permitted to present grievances was justified explicitly by reference to the analogous right of citizens in a democracy.

Congressional decision that the majority choice should be

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[55] *Railway Employees Department* v. *Pennsylvania System*, 2 R.L.B. 207, Decision No. 218.

[56] See, e.g. testimony of Joseph B. Eastman, in Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2nd Sess., pp. 33-34; testimony of Edwin E. Witte in Hearings before Senate Committee on Education and Labor, on S. 2926, 73rd Cong., 2nd Sess., pp. 243-244; testimony of Frances Perkins, in Hearings before House Committee on Labor, on H.R. 6288, 74th Cong., 1st Sess., pp. 278-279.

[57] Hearings before the Senate Committee on Interstate Commerce, on S. 3266, 73rd Cong., 2nd Sess., p. 146.

[58] Hearings before the Senate Committee on Education and Labor, S. 2926, 73rd Cong., 2nd Sess., pp. 243-244.

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the exclusive representative of the employees for the purpose of dealing with the employer necessarily rejected not only simultaneous bargaining with minority representatives but also simultaneous bargaining with individual employees or employee groups. This rejection, we submit, extends to the making of agreements disposing of judicial and administrative as well as legislative matters. The considerations advanced by Congress to show that any system which would detract from the exclusive power of the majority choice would be impractical and would moreover fail to accomplish the paramount purpose of restoring equality of bargaining power apply with full force to the negotiation of agreements disposing of judicial and administrative matters between employers and employees individually whether or not the exclusive representative also participates.

In its report on the bill which became the National Labor Relations Act the House Committee quoted with approval from the *Houde Engineering* decision, *supra:*[80]

> It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. . . .
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> This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7 (a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still control, and the only difference between this and the traditional method of bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only

[80] H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-21.

> what he has no right to ask for, namely, dissension and rivalry. . . .

That Committee also noted that, "It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining." [50] In view of the precedent creating nature of agreements disposing of justiciable matters it is equally important that such agreements be acceptable to, and hence negotiated solely with, the majority. Were they not so negotiated the majority would be forced either to require the employer to ignore them in the future thus introducing elements of instability and discrimination or to accept a settlement which does not reflect the majority view and carry the weight of the bargaining position of the group as a whole.

The Senate Committee made the point that unitary dealing was desirable also because employers "have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions." [51] The disruption which the Committee sought to avoid would be invited if employers were required to dispose of justiciable issues in joint conference with the exclusive representative and employees who were at odds with the representatives' position. As stated by Professor H. A. Millis, later Chairman of the National Labor Relations Board, at the 1935 hearings on the bill which became the National Labor Relations Act: [52]

> Nothing can be said for dealing with first one group and then with another, except that it makes it possible for the employer to play off one group against another and thus defeat real collective bargaining. Furthermore, any such

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[50] *Ibid.*, p. 20.

[51] S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

[52] Hearings at the Senate Committee on Education and Labor, on S. 1958; 74th Cong., 1st Sess., pp. 180-181. See also the testimony of Professor Witte, *supra*, pp. 38-39, and the testimony of Commissioner Joseph B. Eastman before the House Committee on Interstate and Foreign Commerce, on H.R. 7650, 73rd Cong., 2nd Sess., pp. 33-34.

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practice means instability, jealousy and nuisance in administration.

The history of the two Acts shows that Congress fully recognized that adoption of the theory of exclusive representation through the choice of the majority raised questions concerning the scope of the rights of individuals and minorities and the manner in which those rights should be protected. It shows further that Congress considered that minorities had the right to obtain from the exclusive representative equal protection; the right to attempt to become the majority; and the right to present their views to the employer and the exclusive representative; that is the same protection accorded individuals and minorities in political democracy. It should be noted, of course, that the creation and protection of these rights grew out of the adoption of majority rule; under individual bargaining the employees possessed no such rights, and the rights which they did theoretically possess, they were helpless to exercise (*supra*, pp. 14-17). Congress considered that the advantages which would be derived by minorities from the united action of all the employees through the exclusive representative more than compensated for the deprivation of the theoretical right to engage in individual bargaining. Protection of individuals and minorities then, under the system of collective bargaining, stemmed not from a desire to compensate individuals and minorities for the loss of such rights, but to insure within the industrial democracy that Congress was creating the protection for minorities and individuals which centuries of political development had embedded in democratic practice.

The House Committee expressly noted that under the National Labor Relations Act, "Since the agreement made [by the exclusive representative] will apply to all, the minority group and individual workers are given all the advantages of united action." [46] And the Senate Committee noted that minorities would necessarily derive this advantage from the action of the exclusive representative because that representative

[46] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 13.

"will be quite powerless to make agreements more favorable to the majority than to the minority." [32]

The second right, the right to attempt to become the majority, was also protected by Congress (Railway Labor Act, Section 2, Third and Ninth; N.L.R.A. Sections 1, 7, and 9). "The minority is protected by the fact that it is part of the constituency to which the representative must look for continued authority." At the hearings on the 1934 amendments to the Railway Labor Act, Commissioner Eastman was asked by Congressman Wolverton "what provision is made for the individuals who decide not to join any union? Do they have any representation under this bill?" He replied: "They have the right to vote, of course, for their representatives; but the representation would be decided by the majority." [33] The Commissioner had earlier indicated his view that "The will of the majority ought to govern; but there ought to be ample means so that the minority can have a chance to persuade others to their way of thinking and so that there can be an election, if they succeed in converting their minority into a majority." [34]

These two basic methods of advancing the interests of indi-

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[32] S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; see also, H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21; see also, Testimony of Francis Biddle before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., pp. 81-82. In an article in *"Survey Graphic,"* dated February, 1935, entitled *7-A and the Future*, Dean Lloyd K. Garrison of the University of Wisconsin, commented as follows: "The minority, in fact, are benefited by placing upon the employer the duty to bargain exclusively with the majority, for it is only under such circumstances that better terms for the employees, including the minority, are at all likely to be obtained" (pp. 56-57).

[33] The Court stated in its opinion that—

> Congress was concerned primarily with differences between the carrier and the employees, not with differences among the latter or between them, or some of them, and the collective agent. The statute therefore was not drawn with an eye levelled to these problems *except as to choice of representatives*, cf. Sec. 22 Fourth; Sec. 2 Ninth; . . .

(Slipsheet, p. 21, n. 37; italics supplied). We submit that the Act was levelled at these problems and that it disposed of them by the very method mentioned; that is, by providing that differences within the employee group should be resolved by the ballot box.

[34] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2nd Sess., pp. 35-36.

[35] *Ibid*, pp. 33-34.

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viduals and minorities were supplemented by the grant of the right to present grievances which Congress considered merely "added protection." [98]

It should be borne in mind that Congress did not permit its concern over the welfare of individuals and minorities to outweigh its concern for the welfare of the employee group as a whole. Its approach was that of Secretary Perkins, who said: [100]

> It is common in our thinking that the majority shall rule. Of course, under that theory many minorities do not find themselves being represented, but liberties have not been greatly impaired by the rule of the majority, and we have made progress toward democracy with that, recognizing always that there are unrepresented minorities on the political as well as the economic side.

Similarly, Senator Wagner said,[101]

> . . . democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guarantee of political liberty that mankind has yet discovered.

C. The Terms of the Railway Labor Act respecting individuals

While the Railway Labor Act contains no provision analogous to that contained in Section 9 (a) of the National Labor Relations Act, there is reason to believe that Congress did not by this omission intend to deny to individuals and minorities the right to present grievances. Section 2, Fourth of the Railway Labor Act provides:

> . . . That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Attached as it is to the Section which prohibits carrier in-

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[98] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. See also, Testimony of E. E. Witte, Hearings before Senate Committee on Education and Labor, 73rd Cong., 2nd Sess., on S. 2926, pp. 243-244.

[100] Hearings before the House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess., pp. 278-279.

[101] 79 Cong. Rec. 7571, 74th Cong., 1st Sess., May 15, 1935.

terference with the right of employee self-organization, *inter alia*, by the use of "funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining," this proviso like the analogous proviso to Section 8 (2) of the National Labor Relations Act,[109] as the Court, in its opinion conceded (slipsheet, p. 19), was intended primarily to preserve the legality of arrangements pursuant to which union representatives were paid by the employer at regular rates for the time they spent in negotiations with the employer; arrangements which, in the absence of such a proviso would be condemned as constituting contributions to the labor organization or to its representatives. While it might, therefore, be argued that extension of the privilege to employers to confer with employees individually was intended to apply only where a majority had not selected an exclusive representative, the provision need not so be read. We believe that the proviso may be taken to indicate that Congress envisioned conferences between employers and employees individually after as well as before selection of an exclusive representative, and that it wished to permit such conferences to be held on the employer's time.

In this view the proviso to Section 2, Fourth, of the Railway Labor Act assures to individuals and minority groups the same character of right as is accorded them by the provisos to Sections 9 (a) and 8 (2) of the National Labor Relations Act. The proviso to Section 2 Fourth, of course, does not in any manner limit the subject of conferences between employers and individual employees; the word "grievances" nowhere appears therein. Clearly, employees were given the privilege of conferring with the employer on any and all subjects, legislative as well as executive and judicial, both before and after a collective bargaining agreement was executed. Employers were permitted to compensate them for the time spent in such

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[109] Section 8 (2) provides that it shall be an unfair labor practice for an employer "To dominate or interfere with the formation or administration of any labor organization to contribute financial or other support to it: *Provided*, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

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conferences, without distinction as to subject. Equally clearly, therefore, the right to "confer" could not have been intended to include the right to contract with the employer. Had such a right been envisaged the door would have been opened once again to individual contracts on all subjects over which the collective bargaining representative had been given exclusive authority.

We submit that the proviso to Section 2, Fourth, cannot be construed as detracting from the power of the exclusive representative to settle with the employer, and the duty of the employer to settle only with the exclusive representative, all matters growing out of the employment relation, but that it should be construed as permitting individuals under the Railway Labor Act, as under the National Labor Relations Act, to present grievances (as that term is used in that Act), to their employer, and as permitting the employer to discuss the grievances so presented with the employees on company time.

This view of the right reserved to individuals and minorities by the proviso to Section 2 Fourth, particularly in regard to judicial and administrative issues, finds further support in the Act's provisions, contained in Section 3, relating to the functioning of the grievance machinery and to the composition and function of tribunals to be created as the ultimate repositories of power in grievance adjustments.

The Act recognizes, without equivocation, that collective agreements are bi-party contracts between carriers and exclusive bargaining representatives.[109a] This recognition, the final requisite to the creation of a legal framework appropriate to the practice and philosophy of collective bargaining (see p. 30, *supra*), is reflected in the provision for the creation of the National Railroad Adjustment Board. Membership on this Board, created to serve as a final tribunal for the adjustment of grievances which remain unsettled after all other stages of the grievance machinery have been exhausted, is divided equally between representatives designated by the national

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[109a] See the report of the emergency fact-finding board, quoted by Commissioner Eastman at the Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., p. 46.

labor organizations "organized in accordance with the provisions of Section 2 of this Act" and representatives designated by the employers (Section 3, First (a), (b), and (c)). Thus, Congress expressly provided that at the final stage of grievance adjustment the power to settle and decide grievances should be vested jointly in the exclusive representative and the employer. That Congress deliberately chose to reserve to the exclusive representative and the employer acting jointly the power to settle grievances at all stages becomes even more apparent in the light of Section 2 Sixth and Section 3 Second of the Act. The former provides that:

> . . . That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

The latter Section provides that:

> Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section.

By thus permitting exclusive representatives and employers at any time to substitute for the statutory specifications as to the manner of handling grievances at the initial stages, specifications of their own, and for the statutory Adjustment Board of a grievance tribunal of their own, Congress emphasized not only that it viewed grievance adjustment purely as a matter for joint action by the employer and the exclusive representative but also that it had created no rights under the provisions of the Act establishing the Adjustment Board which could not be altered or eliminated by agreement between the employer and the statutory representative.

In this final stage in the grievance procedure, provided by Congress, decisions are made solely by the employer and employee representatives who compose the tribunal; and this is so regardless of the rights of individual employees, if any, to present and prosecute cases before the Adjustment Board. To hold, as did the Court in its opinion, that although Congress

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so clearly reaffirmed the power of the exclusive representative and the employer, acting through their delegates to the Adjustment Board, alone to settle in the final stage grievances which remained unadjusted at prior stages, it nevertheless at the same time denied to the employer and the exclusive representative the power to settle grievances at prior stages without the concurrence of the employees involved, seems to us unwarranted. Such a holding, we submit, is justified neither by logic, the terms of the Act, nor by relevant policy considerations.

In addition to Section 2, Fourth, which explicitly provides that the representative selected by the majority shall act as exclusive representative for the purpose of settling grievances (*supra*, p. 57); to section 2, Second, which provides that grievances shall if possible be decided by the employer and the exclusive representative *(supra)* and Section 2 Sixth which imposes a duty upon the exclusive representative to set a time for meeting with the representatives of the carrier for the purpose of deciding grievances, Section 3 (i) provides that

> . . . disputes arising out of grievances shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . .

This provision, that before grievance disputes may be submitted to the Adjustment Board they must have been handled by the parties "in the usual manner up to and including the chief operating officer of the carrier," again demonstrates Congressional reliance upon full utilization of the machinery of collective bargaining in all its phases to accomplish adjustment of grievances. The purpose of this provision, as Mr. Richberg pointed out in his testimony on the 1926 bill which contained the same phrase, was

> . . . simply this, . . . that conference is not to include, in these grievance disputes merely the initial conference, for instance, discussion between a foreman and a committee of employees, or superintendent of motive power, and a committee, if the machinery provided by the road provides

> for an appeal from that officer's ruling to some higher official, so that until the road itself has exhausted the machinery it has provided for handling these disputes, then they should not be taken to an adjustment board, but when the ordinary, regular machinery established for dealing with these disputes has been utilized, then the dispute is expected to go to an adjustment board.[103]

Testifying concerning the "usual manner" of handling grievances on the railroads, Mr. W. N. Doak, Vice President and National Legislative Representative of the Brotherhood of Railroad Trainmen, said:

> I will state for my own organization, because I am more familiar with it than I am with any other, and I have served in every capacity, from local chairman to that of vice president of that organization, that first of all, if a man has a grievance he must submit it to his local lodge and get the majority of the members present at that meeting employed on the division or district where he is employed to sanction it before it can be taken up by his local committee. That is the first thing. Secondly, it is referred to the local committee and they have a right to amend the grievance or handle it in any way they see fit and report back to the local lodge. The lodge can drop the case or it may be referred to the general committee, which general committee consists of the local chairmen from the respective divisions, who, with the officials of the railway, elect their own chairman.
>
> It can be handled by that general committee or thrown out as they see fit. Under this machinery, after it has gone through all this routine the case can go to the general manager, or the chief operating officer of the railroad, and with him conferences, be held and if the parties could not agree, an appeal to the president may be made, if it is wanted or, to the highest officer of that railroad before any of the machinery of this bill would be involved. Then if it was a grievance it would go to the adjustment board.[104]

These descriptions of the grievance adjustment procedure developed under collective bargaining in the railroad field by

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[103] Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 7180, 69th Cong., 1st Sess., p. 67.

[104] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 7180, 69th Cong., 1st Sess., pp. 202-203. Cf. Garrison, The National Railroad Adjustment Board, A Unique Administrative Agency, 46 Yale, L. J., 567, 577; Hoxie, op. cit. *supra*, note 1, pp. 270-271.

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1926, make it perfectly clear that the power to settle grievances at all stages prior to Adjustment Board proceedings is vested in the appropriate officers designated by the carrier and by the exclusive representative. The witnesses contemplated, and their view was patently adopted by Congress, that if these officers settled a grievance, that concluded the matter, and the grievance could not thereafter be presented to the Adjustment Board. Moreover, Mr. Doak's testimony reveals that it was fully understood that settlements made between the officers of the exclusive representative and of the employer at any stage of the grievance machinery, would be binding upon the employees involved whether they were pleased with the settlement or not, just as decisions of the Adjustment Board are binding upon them whether they agree or not. The government in taking the position that "usual manner" includes presentation by individuals (Government's Brief, pp. 7-8, 25, 45-49) relies on a decision by the district court in *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338. The record in that case fails to disclose any evidence that individual employees, as opposed to "minority" unions, ever presented their own grievances. As to minority unions, it only showed presentation by national organizations on behalf of their members when working in an overlapping craft. Even where this was done, the "minority" union acted with the acquiescence and approval of the majority union, to whom the "minority" union accorded similar privileges when their positions were reversed (R. 216-218, 231-235, 738-743).

Had Congress contemplated that individuals and minority groups were to be accorded the right to participate in the settlement of grievances affecting their interests the statute would necessarily have contained provision for participation by such employees in the deliberations and decisions of the Adjustment Board, as well as provision for participation by them in the deliberations and decisions of the officers of the exclusive representative and the employer at earlier stages. The statute contains no such provision for individual participation in grievance adjustment, and the legislative history of the "usual manner" phrase, set forth in detail in the Brief filed on behalf of the Railway Labor Executives Association in sup-

port of the Petition for Rehearing in the instant case, pp. 4-27, demonstrates conclusively that no intention to sanction such procedure can be attributed to Congress.

In accordance with its view that the collective bargaining agreement is a bi-party contract, Congress, throughout the Act, and particularly in Sections 3 First (i) and (j), in discussing proceedings before the Adjustment Board, utilized the term "parties" to refer to the employer and the statutory representative. To underline this usage Congress made it clear that proceedings before the Adjustment Board were to be bi-party, not tri-partite proceedings. Thus Section 3 First (i), *supra*, provides that "disputes may be referred by petition of the parties or by *either* party to the appropriate division of the Adjustment Board" (italics added). The genesis of this provision (see Brief on behalf of Railway Labor Executives Association, *supra*, pp. 4-18) in the Transportation Act of 1920 shows that Congress could not have considered that individuals would be "parties" to proceedings before the Adjustment Board. If, on the contrary, it had been contemplated that individuals would be "parties" in such proceedings, it would follow, in view of the bi-party character of the proceedings, that statutory representatives could not be parties, and could not bring cases before the Adjustment Board, a result which would be completely incompatible with the statute's purposes and structure.

Section 3 First (j) which sets forth the nature of proceedings before the Adjustment Board, the manner in which parties may appear at hearings, and the duty of the Board to give due notice of all hearings is fully consistent with the view set forth above. It provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Once again it should be noted that if the term "parties" in this Section is read as referring to the employer and individ-

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ual employees the statute would contain no provision for appearances by or notice to the statutory representative. If, on the other hand, the term "parties" is read as referring to the employer and the exclusive representative, the language is easily explained. The use of the term "in person" of course, is common in legislation dealing with the manner of appearance before judicial and quasi-judicial tribunals. Its usage in the Act would have been dictated by the possibility, if contrary to fact, it were no more than a possibility, that a carrier involved in such a dispute would be individually owned. In fact the statute defines "carrier" as including "any individual or body . . . when in the possession of the business of any such 'carrier' " (Section 1 First).

Nor can the provision requiring due notice to "the employee or employees and the carrier or carriers involved" be construed as requiring notice to employees individually as distinguished from notice to their statutory representatives any more than it can be construed as requiring notice to a carrier or carriers as distinguished from their representatives. The statute shows on its face that just as Congress considered and used the words representatives of a carrier as synonymous with the carrier, so Congress considered and used the word employees as synonymous with their statutory representative. Here again statutory usage conforms to collective bargaining practice in which the union *is* the employees. Thus, Section 2 First imposes a duty upon all "carriers, their officers, agents and *employees* to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes, whether arising out of such agreements or otherwise. . . ." Clearly the duty thus imposed upon "employees," to "make and maintain agreements" and "settle all disputes" is imposed not upon individual employees as such, but upon the statutory representative of the employees. Section 2 Second refers to "all disputes" which must be considered and decided by representatives of the carrier and the representatives of the employees "interested in the dispute," as existing between "a carrier or carriers and its or their employees. . . ." Section 2 Sixth, similarly refers to disputes arising out of grievances, concerning which the exclusive representative is under a duty to

confer with "the designated representative or representatives of such carrier or carriers," as disputes "between a carrier or carriers and its or their employees." This language, and mode of reference is repeated in Section 3 First (i), where, in the same context, the further obligations of the parties in cases arising out of grievances are set forth. The meaning of the words "employee or group of employees" as used in Section 3 First (i) is further illuminated by reference to Section 5. These two sections describe the disputes which are to be referred to the Adjustment Board and the Mediation Board, respectively. Both of them refer to disputes "between an employee or group of employees and a carrier," and both permit "either party" to such a dispute to invoke the services of the appropriate agency. This Court has noted that "disputes concerning the making of agreements" are within the jurisdiction of the Mediation Board (Slipsheet, p. 11), and that authority to negotiate concerning these disputes is vested solely in the representative (Slipsheet, p. 14). It is, therefore, clear that the employee party referred to in Section 5 is the representative, and not an individual employee. The parallel language of Section 3 First (i) must be given the same interpretation. The use of the term "employee or employees" in Section 3 First (j), consequently, far from having intrinsic significance or preserving rights to employees as distinguished from their statutory representative, simply comports with the use of the term "carrier or carriers" in that clause, and the obligations imposed upon the Adjustment Board, to the one as to the other, are fulfilled by giving due notice to the representatives of each (See Section 1, Sixth).

The suggestion advanced in the government's brief that the term "designated representative" which appears throughout the 1934 Act, and particularly in Section 2 Sixth, may not refer exclusively to the statutory representative selected by a majority of the craft or class pursuant to the terms of that Act (pp. 25-26) is simply absurd. The only way in which such an argument can be made is by ignoring the fact that in the 1934 Act Congress provided for majority rule and lodged power in the Mediation Board to determine, by means of an election or otherwise, the identity of the "designated repre-

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sentative." (Sec. 2 Ninth). The government's brief, consequently, attempts with a fair degree of success to ignore this crucial fact. The only reference to it in the government's brief appears in a footnote (p. 8, note 9), many pages before its discussion of this point. Even in that foonote, the Government attempts to convey the impression that somehow majority rule was made applicable by the statute only to the negotiation of major contracts; how, the Government never explains.

The construction of the statute urged in this brief is alone consistent with the objectives of Congress in the Act, and of labor organizations and employers in collective bargaining, when provision is made for arbitration as the final step in grievance adjustment. Arbitration machinery is utilized to resolve disputes between unions and employers, not between unions and their constituents.[105] And there is no basis whatsoever for assuming that Congress in providing for arbitration machinery within the "usual" framework of collective bargaining, intended to depart so drastically from customary practice as to create instead an agency in which the employer, facing the union on the one hand, and one or more employees on the other, is called upon to decide matters in issue between them. Yet such a result cannot be avoided if, as the Court's opinion declares, the employees interested in the dispute may bring a case to the Adjustment Board any time they are dissatisfied with the position taken by the union, and having brought the case, must be treated as parties to it. To sanction such a practice would be to invite employers to play off one group against another, thus destroying the entire fabric of collective bargaining and relegating the individuals and minority groups to a position in which they are once more at the mercy of the employer.

We submit that the proviso to Section 2 Fourth, like the proviso to Section 9 (a) of the National Labor Relations Act, points the way to according real protection to the interests of individuals and minority groups in the only manner and to the only extent compatible with the survival of collective bargaining. As appears from Mr. Doak's statement, occasionally

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[105] Lenhoff, Arthur, *The Present Status of Collective Contracts in the American Legal System* (May 1941), 39 Mich. L. Rev. 1109, 1124, 1134.

individuals or groups of employees are unsuccessful in obtaining the support of the union for some grievance which they may wish to present. By virtue of the proviso the union is, however, prevented from precluding presentation of the grievance directly to the employer. Thus, the employee, though unable to secure the aid of the majority representative in pressing his grievance, is free to attempt to persuade the employer of its merit. And, until the grievance is finally disposed of by agreement between the employer and the exclusive representative, the individual is free to continue to present his case before them. He is not free, however, to destroy collective bargaining by inviting the exercise of full judicial power by representatives of the employer without the concurrence of the exclusive representative in whom the other half of that power is vested.

IV. JUDICIAL AND ADMINISTRATIVE DECISIONS SUPPORT A CONSTRUCTION OF THE RAILWAY LABOR ACT WHICH EXCLUDES INDIVIDUAL BARGAINING RESPECTING GRIEVANCES

A. Administrative Decisions

Decisions of the National Labor Relations Board fully uphold the view of the employer-employee relationship and the interpretation of the two statutes set forth above. It has repeatedly held [106]

> that the execution of a collective contract does not end the process of collective bargaining, and that the interpretation and administration of a contract already made and the settlement of disputes arising under any such contract are properly regarded as within the sphere of collective bargaining.

It has recognized that [107]

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[106] *Matter of Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706. Accord; *Matter of Rapid Roller Co.*, 33 N.L.R.B. 557, 589; *Matter of Carroll's Transfer Company*, 56 N.L.R.B. 935, 937-938; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 982; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124, 133; *Matter of The Alexander Milburn Co.*, 62 N.L.R.B., No. 67.

[107] *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124, 134. Accord: *Matter of North American Aviation, Inc.*, 44 N.L.R.B. 604, 612.

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> Matters pertaining to the administration, interpretation, or modification of the collective agreement normally arise as grievances,

and that [108]

> The interpretation and application of the terms of a contract and the establishment of precedents involved in the adjustment of grievances are often as important, or more important, than the original collective bargaining which led to the signing of the contract.

Accordingly, it early held that [109]

> Section 7 guarantees employees the right to bargain collectively concerning grievances. . . . Therefore, any "interference" with the employees' rights to bargain collectively concerning grievances through their duly designated representative, . . . is proscribed by Section 8 (1) of the Act.

Consistently with these principles, the Board has condemned refusals by employers to bargain collectively concerning the disposition of grievances both before [110] and after [111] execution of written agreements and has also held that settling of grievances by contract with individuals is an unfair labor practice.[112] The grievances thus found to be within the scope of collective

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[108] *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 982.

[109] *Matter of Cities Service Oil Co.*, 25 N.L.R.B. 36, 44. This case involved the refusal of three ship owners to grant passes to agents of the statutory representative to board their ships. The Board's holding that such passes should be granted rested on the necessity of allowing the union to investigate the facts as to "grievances" (25 N.L.R.B. at pp. 25 *et seq.*). The process of arriving at written contracts was not involved to any extent.

[110] *Matter of Rollway Bearing Co., Inc.*, 1 N.L.R.B. 651, 658-660; *Matter of The Boss Manufacturing Co.*, 3 N.L.R.B. 400, 411-412, 414; *Matter of American Hair and Felt Co.*, 19 N.L.R.B. 202, 209-214; *Matter of Hoosier Veneer Co.*, 21 N.L.R.B. 907, 930-931, 934; *Matter of Arundel Corp.*, 59 N.L.R.B. 505, 511; *Matter of Inter-City Advertising Co.*, 61 N.L.R.B. 1384; *Matter of Ross Gear and Tool Co.*, 63 N.L.R.B., No. 158.

[111] *Matter of Rapid Roller Co.*, 33 N.L.R.B. 557, 589; *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981, 992; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124, 135; *Matter of The Alexander Milburn Co.*, 62 N.L.R.B., No. 67.

[112] The *Milburn; U. S. Automatic*, 57 N.L.R.B. at 132-136; *Hughes Tool*, 56 N.L.R.B. at 981, 984, 995; *Arundel*, 59 N.L.R.B. at 510-511; and *Inter-City* cases, *supra*, notes 108, 110 and 111.

bargaining have included such matters as discharges [113] and changes in work assignments."[114]

In *Matter of North American Aviation, Inc.*, 44 N.L.R.B. 604, the employer established, by unilateral announcement, a special procedure for employees who wished to present grievances "directly" to it, after a grievance procedure had been established for all the employees in a contract between the employer and the statutory representative. The Board held that the employer's action was illegal since, "Grievances and grievance procedure are normal and proper subjects of collective bargaining" (44 N.L.R.B., at p. 611). The order issued by the Board, however, was set aside by the Circuit Court of Appeals for the Ninth Circuit.[115] Thereafter, the Board's interpretation of the proviso to Section 9 (a) was clarified in an opinion issued by its General Counsel (13 L.R.R. 142-143) and adopted by the Board in its Eighth Annual Report (pp. 37-38, 67). This opinion incorporated views which, as the Board noted, were not presented to the Court in the *North American* case (Eighth Annual Report, p. 67).

The interpretation thus reached was incorporated in two decisions issued by the Board in 1944. *Matter of Hughes Tool Co.*, 56 N.L.R.B. 981; *Matter of U. S. Automatic Corp.*, 57 N.L.R.B. 124. In the *Hughes Tool* case, the Board held that prior to execution of a contract the adjustment of a grievance constitutes "bargaining respecting a condition of employment," that after execution of a contract, such an adjustment constitutes either an interpretation or application of the contract or, if the subject matter is not dealt with in the contract, bargaining respecting a condition of employment, and that the right to negotiate concerning such matters is "vested exclusively in the statutory representative." It interpreted the proviso to Section 9 (a) as permitting individual employees to present grievances "by appearing in behalf of themselves . . . at every stage of the grievance procedure, but that the exclusive representative is entitled to be present and negotiate at

[113] See the *Rollway, Boss Manufacturing, Hoosier Veneer*, and *Alexander Milburn* cases, *supra*, notes 110 and 111.

[114] See the *Inter-City* case, *supra*, note 110.

[115] *National Labor Relations Board* v. *North American Aviation Co.*, 136 F. 2d 898. This decision is discussed below, p. 74, note 118.

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each such stage concerning the disposition to be made of the grievance." Where the exclusive representative declines to participate in the disposition of the grievance, the employer may meet with the employees alone and adjust it (56 N.L.R.B., at pp. 982-983). In reaffirming this interpretation, which, as the Board noted, gives the proviso "its literal meaning," and therefore comports with the rule that provisos to remedial legislation are to be strictly construed so as to further the broad purposes of the legislation, the Board said:

> The extension by employers to individuals or groups of employees of greater rights than these, would undermine the kind of collective bargaining which the Act seeks to encourage."[116]

This interpretation of the proviso to Section 9 (a) by the National Labor Relations Board has been followed by the National War Labor Board. In *Re Douglas Aircraft Co., Inc.*, 25 War Labor Rept. 57, 16 L.R.R. 585, that Board said:

> It is true that the union settlement of a grievance presented directly by an employee may not be as advantageous to him as he would want or even as he might be able to obtain. But provided only the union has not acted in bad faith such a result is an integral part of any system of majority rule and is no justification for subverting the collective bargaining process."[117]

B. Judicial Decisions

This view of the employer-employee relationship, incorporated in decisions of the Federal administrative agencies, is also supported by judicial authority. In fact, we believe that it is required by the leading decisions of this Court.

Judicial recognition has been given to the fact that the establishment of working conditions in industry is a governmental process. In *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 638, the Fourth Circuit noted not only that the execution of written agreements was

[116] *Matter of U. S. Automatic*, 57 N.L.R.B. 124, at p. 135.

[117] 25 War Labor Rept., at p. 62, 16 L.R.R., at p. 586. Accord: *In re John Morrell & Co.*, 21 War Labor Rept. 730, 735, 742, 15 L.R.R. 871; *In re McLouth Steel Corp.*, 27 War Labor Rept. 514, 515, 517, 518, 521, 17 L.R.R. 252, 253-254; Cf. *In re Western Electric Co., Inc.*, 24 War Labor Rept. 525, 533-534, 16 L.R.R. 493, 494.

the legislative aspect of that process, but also that the substitution of this process for direct negotiations between employer and employee meant elimination of autocratic rule:

> The purpose of the written trade agreement is, not *primarily* to reduce to writing settlements of past differences, but to provide *a statement of principles and rules for the orderly government of the employer-employee relationship* in the future. The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon *which the relationship of employer and employee is to be conducted.* Wages may be fixed by such agreements and specific matters may be provided for; but the thing of importance is that the agreement sets up a modus vivendi, under which employer and employee are to carry on. It may be drawn so as to be binding only so long as both parties give their assent to it; but the mere fact that it provides a framework *within which the process of collective bargaining may be carried on* is of incalculable value in removing the causes of industrial strife. If reason and not force is to have sway in industrial relationships, such agreements should be welcomed by capital as well as labor. They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry *subject to the arbitrary power of the employer.* (Italics added.)

In *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, this Court placed restraints on the power of a representative under the Railway Labor Act to negotiate contracts precisely because that power is "not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" (323 U. S. at p. 198). It held:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it also im-

> posed on the representative a corresponding duty (323 U. S. at p. 202).

This Court has recognized also that collective bargaining is a continuous process which includes interpretation of the legislative agreement:

> . . . the Act imposes upon the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning.

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U. S. 332, 342. Accord: *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 459 (C.C.A. 7), cert. denied 317 U. S. 650. Accordingly, it has been held that it may be necessary "to bargain collectively . . . for the adjustment of complaints or alleged violations of . . . an agreement." *Newark Morning Ledger Co.* v. *National Labor Relations Board*, 120 F. 2d 266, 267 (C.C.A. 3), cert. denied 314 U. S. 693. The Court there said:

> Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned.

In upholding and enforcing the order of the Board in *Matter of Cities Service Oil Co., supra*, the Court of Appeals for the Second Circuit said (*National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. 2d 149, 151), "The result of refusing passes [to bargaining representatives to handle grievances] is undoubtedly to prevent the most effective sort of collective action by the employees." It expressly noted, in this connection, the importance of having grievances handled by experienced representatives, rather than by those who are "continually under the eye of the master." (122 F. 2d, at p. 151). In *National Labor Relations Board* v. *Bachelder*, 120 F. 2d 574 (C.C.A. 7), the Court upheld a Board finding that the employer had illegally failed to bargain collectively about certain

discharges which the union held to have been discriminatory. In doing so, it rejected the employer's contention that:

> That is not a part of negotiation. Negotiation contemplates an agreement for future activities but does not contemplate a settlement of past grievances. It involves future relationships for employer and employees. It is toward the future and not toward the past. They are two distinct and separate situations and the law recognizes them (120 F. 2d, at p. 577).

When the Board's order in the *Hughes Tool* case, *supra*, came before the Circuit Court of Appeals for the Fifth Circuit, it was enforced with only one modification material here, although in its opinion the Court appeared to reject the contentions of the Board in several respects. *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69.[138] Thus the Court held that the National Labor Relations Act distinguishes between collective bargaining, which it viewed as fixing rules of employment for the future, and the disposition of grievances. It stated that some grievances may involve facts "peculiar to the employee, not affecting the unit" (147 F. 2d, at pp. 72-73). At the same time it recognized that grievances

> may raise a question of the meaning of the contract, or present a situation not covered by the contract touching which an agreement ought to be made. In the latter case it is plain that the representative ought to participate, for bargaining, rather than a mere decision of a case according to the contract is involved. Attention to grievances is therefore mentioned in Section 2 (5) as part of the business of the representative, but Section 9 (a) does not give him the *exclusive* right to handle them unless they

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[138] As noted above (p. 70), an earlier decision of the Board holding that the proviso to Section 9 (a) did not permit an employer to set up a separate grievance procedure in addition to that established by the collective contract, was set aside by the Circuit Court of Appeals for the Ninth Circuit in an opinion which held that the proviso permitted the employer to take up and dispose of grievances presented by individuals, and that hence, it was permissible to have such a dual grievance procedure under which matters involving interpretations of the collective contract could be determined without reference to the exclusive bargaining representative. *National Labor Relations Board* v. *North American Aviation Co.*, 136 F. 2d. 898. We submit that this decision was clearly erroneous.

> really involve a bargaining for the unit, or an interpretation of the bargain (*id.* at p. 73).

Thus the Court clearly recognized that the representative alone has a right to participate in the disposition of those grievances which "involve a bargaining for the unit" and that that right is an aspect of its statutory right to bargain collectively. The decree which the Court ultimately entered required the employer to notify the representative of each grievance presented to it to enable the representative to advise the employer whether it considered that it had an interest in disposition of the grievance, and to bargain collectively concerning disposition of the grievance unless it involved "some question of fact or conduct peculiar to the employee . . . and not involving an interpretation of a collective agreement or a matter properly the subject of a collective agreement." [19]

The part which the adjustment of grievances necessarily plays in the collective bargaining process makes directly applicable here those decisions of this Court which rejected the theory that individual bargaining could co-exist with collective bargaining under either the Railway Labor Act or the National Labor Relations Act. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, and *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332. In the latter case, this Court held that:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group (321 U. S. 338).

Accordingly, it held that the institution of collective bargaining puts an end to the use of individual contracts with the employees. In the *O.R.T.* case, the Court overruled the employer's contention that individual contracts made after the collective contract superseded the latter, saying:

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[19] The National Labor Relations Board, on the authority of *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 346-347, quoted below (p. 76), urged the Court that there was no room for the exception thus made and that all grievances came within the authority of the bargaining representative. Whether it was correct in that position need not be decided here since the grievance involved in the instant case was clearly a matter affecting the craft as a whole.

> If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.

Turning to the employer's further contention that the particular situation which the employer and the employees had dealt with by separate agreement was "unique," this Court pointed out that (321 U. S. at pp. 346-347):

> . . . exceptional situations often have an importance to the whole because they introduce competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. . . . But the Company did not observe the right of the representatives of the whole to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract.[10]

Since the instant case involves principally the question whether individual employees may attempt to secure a better settlement of grievances than the collective representative is able or willing to secure for them, it is of the greatest importance to note that in the *J. I. Case* and the *O.R.T.* cases this Court ruled out not only those individual contracts which lower the collective standard but also those which secure "better terms than those obtainable by the group" (321 U. S., at p. 338):

> The practice and philosophy of collective bargaining looks with suspicion on such individual advantages . . . advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice or representatives; increased compensation, if individually deserved, is

[10] The claim dealt with in the *O.R.T.* case was in fact a grievance, in that it rested on a failure to apply the terms of a collective contract. It came before and was decided by the National Railroad Adjustment Board, the agency established by the Railway Labor Act to dispose of disputes involving the "application of agreements." Yet it was handled throughout by the emloyees' representative without participation, for ought that appears, of the employees directly involved.

> often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole (321 U. S. at pp. 338-339).

In reaching these conclusions, the Court clearly indicated the extent of and limitations upon the rights of individual employees. It noted that every employee in the unit receives the advantages of the "strength and bargaining power . . . of the group" (321 U. S., at p. 338). It noted further that each individual employee has a voice in determining the representation, if any, of the group, but that this right is subject to the qualification necessary wherever "the majority rules;" that "if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective results" (321 U. S., at p. 339). Finally, this Court has held that each employee is entitled to the same protection against arbitrary discrimination that citizens enjoy in democratic government. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 198, 202.

We submit that these cases show that the exclusive bargaining representative has the right to participate in the disposition of grievances, that that right is an aspect of its exclusive statutory power to "bargain collectively" on behalf of the employees, and that hence the words of this Court in the *Steele* case, *supra*, that, where a representative has been selected, members of the craft "cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining" (323 U. S., at p. 200) are fully applicable here. In the words of the Circuit Court of Appeals for the Sixth Circuit, collectivization of the employment bargain requires each employee "to surrender to a collective agent his individual right to bargain with an employer."[28] We believe that this was the burden of the decision of this Court in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678; that is, that the employer should refrain from operative dealings with any but the duly chosen employee repre-

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[28] *National Labor Relations Board* v. *Knoxville Publishing Co.*, 124 F. 2d 875, 881 (C.C.A. 6).

sentative respecting terms and conditions of employment. The Court there said (at p. 686):

> Bargaining carried on by the employer directly with the employees, whether a minority or a majority . . . would be subversive of the mode of collective bargaining which the statute has ordained . . . (321 U. S., at p. 684). . . . orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves . . . (*id.*, at p. 685). [It was the employer's statutory duty to refuse] to negotiate with anyone other than the duly designated bargaining representatives of his employees.

These decisions the government in its brief now in effect asks this Court to overrule. For the government admits (pp. 20-21, 32-33) that the only time the individual will wish to represent himself in adjusting a grievance is when he thinks he can get more from the employer than the collective representative is willing or able to get for him. To permit him to do so will once again open the door to employer exploitation of competition among employees. We had thought that it was too late in the day to suggest that the door which had been shut by Congress in the Railway Labor Act and the National Labor Relations Act and locked by this Court in the *J. I. Case, O. R. T.* and *Medo* cases, should now be blasted open.

CONCLUSION

In executing the settlement agreement of October 28, 1938, the Brotherhood was acting in its capacity of statutory representative, in which capacity it possessed exclusive power to contract with petitioner for the settlement of grievances. The settlement so executed is therefore valid and binding upon the complaining employees. In its capacity as party to the contract with petitioner dated April 1, 1927 (*supra*, p. 4), and as statutory representative, the Brotherhood was empowered to submit the grievance upon which the complaint herein is based to the Adjustment Board, and thereby to confer jurisdiction upon the Adjustment Board to issue a binding

decision on the question. Since the individual complaining employees could not lawfully contract with the employer for the settlement of the claim, and since the Brotherhood had full power to represent them in the proceedings before the Adjustment Board, their failure to participate as parties in the settlement agreement and in the proceedings before the Adjustment Board cannot detract from the binding nature of the settlement agreement and the Adjustment Board's decision. We respectfully submit, therefore, that the decision of the Circuit Court of Appeals should be reversed with directions to affirm the judgment of the District Court.

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